IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY.

MELWOOD DAIRY, a corporation, et al, Plaintiffs	)	
vs.	)	NO. 868
THOMAS J. SPARKS, United States Attorney for the Western District of Kentucky, Defendant	)	IN EQUITY

BRIEF OF DEFENDANT, THOMAS J. SPARKS, IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE BILL OF COMPLAINT AND IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A TEMPORARY INJUNCTION.

STATEMENT OF THE CASE

This matter is before the Court upon: (1) the application of the plaintiffs for a preliminary injunction based upon (a) their verified bill of complaint and (b) the affidavit of Chas. H. Schimpeler; and (2) the motion of the sole defendant, Thomas J. Sparks, United States Attorney for the Western District of Kentucky to dismiss the bill of complaint upon the grounds stated in said motion; and (3) the written objections of the defendant, Sparks, to the granting of a preliminary injunction for the reasons and upon the grounds stated in said written objections; and (4) three affidavits filed in support of said written objections. Defendant contends that the bill of complaint fails to state any case in equity for ultimate relief and hence should be dismissed; and, secondly, in any event, no case whatsoever is made in the bill for granting of a preliminary injunction.

Plaintiffs in their bill of complaint seek a preliminary injunction and on final hearing a permanent injunction enjoining and restraining the defendant Sparks, United States Attorney for the Western District of Kentucky

> "from proceeding against them by indictment or otherwise for their failure to comply with any of the terms and provisions of the License here involved;"

and in their prayer plaintiffs further ask that Section 8, subsections 3 and 4 of the Agricultural Adjustment Act and the Louisville License issued pursuant to said Section 8, subsection 3 be declared unconstitutional as violative of certain provisions of the Federal Constitution. Before further stating the theory of the bill of complaint, it will be helpful to the Court, first, briefly to set forth the basic sections of the Agricultural Adjustment Act here involved; secondly, to state the facts with respect to the issuance of the License.

"The basic Sections of the Act here involved.

The basic provisions of the Agricultural Adjustment Act involved in this case are as follows:

Declaration of Emergency

That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act.

This language is immediately followed by a Declaration of Policy', contained in Section 2 of the Act. Briefly stated, this section declares it to be the policy of Congress (with certain stated limitations) to restore to farmers the purchasing power which they had enjoyed in what the Act calls the 'base period,' defined as August 1909-July 1914.

In order to carry out such policy, the Act confers upon the Secretary of Agriculture certain powers, among which are the following:

SEC. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power -

(2) To enter into Marketing Agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. * * * *

(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof.

Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof.

The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than $1,000. for each day during which the violation continues." (Italics ours.)

The Louisville License.

Pursuant to said Section 8 (3) a License for milk was issued by the Secretary of Agriculture on May 31, 1934, effective June 1, 1934.

In said License the Secretary of Agriculture, having made certain findings of fact, licensed distributors in the area in question. The language of these findings is as follows:

"WHEREAS, the Secretary finds that the marketing of milk for distribution in the Louisville Sales Area and the distribution thereof are entirely in the current of interstate commerce because the said marketing and distribution are partly interstate and partly intrastate commerce and so inextricably intermingled that said interstate commerce portion cannot be effectively regulated or licensed without licensing that portion which is intrastate commerce;

NOW, THEREFORE, The Secretary of Agriculture, acting under the authority vested in him as aforesaid;

Hereby licenses each and every distributor to engage in the business of distributing, marketing or handling milk or cream as a distributor in the Louisville Sales Area, subject to the following terms and conditions:"

The License is a blanket license and licenses all distributors described in the License to engage in the distribution of milk upon the terms and conditions therein provided.

The thirteen plaintiffs are clearly made licensees under this License and indeed no claims to the contrary are suggested by the bill of complaint.

Theory of the Bill of Complaint

The theory of the bill of complaint is based upon the following two contentions:

(a) That sections 8 (3) and 8 (4) of the Act and the Louisville License are unconstitutional as applied to the business of the plaintiffs for reasons hereinafter to be discussed,

(b) The only attempt made in the bill of complaint to show an injury to the plaintiffs rests entirely upon the claim that, if plaintiffs violate the terms or conditions of the License, they will be subject to:

(1) A fine of $1,000. a day for each violation of the License, pursuant to Section 8 (3) of the Act;

(2) A fine of $100. for each violation of the License, pursuant to Section 10 (c);

(3) A fine and imprisonment for failure to furnish reports or information required by the License or requested or directed by the Secretary. Plaintiffs' theory here is that Section 10 of the Federal Trade Commission Act which was made a part of Section 10 (h) of the Agricultural Adjustment Act provides these heavy penalties for such failure of the plaintiffs to furnish reports or information which may be required to be furnished by the Secretary.

Position of the Defendant

The position of the defendant is that upon this record it is wholly unnecessary for this court to pass upon the question of the constitutionality of the sections of the statute challenged or of the License, and that the constitutional validity of the Agricultural Adjustment Act

is not properly presented by this record for judicial decision. Briefly stated our position more specifically is as follows:

(a) The draftsman of the bill of complaint was completely in error in assuming and alleging that the Agricultural Adjustment Act provides any penalties whatsoever by way of imprisonment or fine for a violation of the terms and conditions of the Louisville License (or for that matter, any License issued pursuant to the Act). The penalty of $1,000. a day provided for by the Act is for doing business without a License. The only other penalty provided for by the Act is the power of the Secretary of Agriculture to suspend or revoke a License "after due notice and opportunity for hearing." It is important to note that this power to revoke a License is vested in the Secretary of Agriculture and not in the United States Attorney. We shall show that the defendant Sparks had no power under the law to bring criminal or civil proceedings to inflict fines, penalties or forfeitures; hence, by reason of the foregoing,

(1) No injunction will lie against the defendant Sparks because of his lack of power to inflict any injury upon the plaintiffs,

(2) The bill fails to show any danger or irreparable injury to the plaintiffs by anybody.

(b) The bill of complaint fails to allege that the plaintiffs have exhausted their administrative remedies, in such case expressly named and provided by General Regulations, Series 4, Revision 1; hence, plaintiffs are not entitled to any relief in a court of equity.

If this court sustains either of the foregoing contentions, it will have no occasion to consider the question of constitutionality in this case. We shall, however, answer the contentions made by plaintiffs in respect to the constitutionality of the statute.

ARGUMENT

I.

The Bill fails to Allege Facts Showing any Danger of Irreparable Injury to the Plaintiffs.

The Bill fails to make a showing that the injunction prayed for is necessary to prevent immediate irreparable injury to the plaintiffs. It is well settled that the courts will not enjoin officials from enforcing an allegedly unconstitutional statute unless the complainant clearly demonstrates that such remedy is necessary to prevent direct and immediate injury to the plaintiff from the action of the person against whom the suit is brought.

As stated in the recent decision in Yarnell et al v. Hillsborough Packing Company, et al (C.R.A. 5th Circ.) Number 7309, decided April 14, 1934, involving a bill to restrain a "Control Committee" appointed under a citrus fruit license issued under the provisions of the Agricultural Adjustment Act from enforcing its orders:

> "Injunction does not lie merely because an act is unconstitutional; but one seeking injunctive relief on that ground must show that he is entitled to it on some clear ground of equity jurisdiction. Boise Water Co. v. Boise City, 213 U.S. 276; Northport Co. v. Hartley, 283 U.S. 568."

The only attempt made in the bill of complaint to show an injury to the plaintiffs is contained in the claim that if plaintiffs violate the terms or conditions of the License, they will be subject to:

(1) A fine of $1,000. a day for each violation of the License pursuant to Section 8 (3) of the Act;

(2) A fine of $100. for each violation of the License, pursuant to Section 10 (c);

(3) A fine or imprisonment for failure to furnish reports or information required by the license or requested by the Secretary of Agriculture. Plaintiffs' theory here is that Section 10 of Federal Trade Commission Act which is made a part of Section 10 (h) of the Agricultural Adjustment Act provides these penalties for failure to comply with requests of the Secretary for information.

Upon analysis it clearly appears that not one of these fines may conceivably be imposed upon the plaintiffs at this time, and plaintiffs' contentions in this respect can only be explained as resting upon a misconstruction of the Act.

(A) Subsection 3 of Section 8 of the Agricultural Adjustment Act provides:

> (The Secretary of Agriculture shall have power -) "To issue licenses permitting processors, associations or producers, and

others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than $1,000. for each day during which the violation continues."

This provision does not, as alleged in the bill, impose any fine or penalty whatever upon a licensee for conducting business without complying with the terms of the License. The only offense provided by this subsection is that of handling an agricultural commodity (here, milk) without a License. Each of the plaintiffs is now licensed to handle milk in the Louisville Sales Area, for the milk License specifically licenses "each and every distributor to engage in the business of distributing, marketing or handling milk or cream as a distributor in the Louisville Sales Area." Therefore, the plaintiffs cannot be in any present danger of being subjected to the imposition of fines. Nor can the plaintiffs ever be subjected to the imposition of these fines until they handle milk in the Louisville Sales Area after their present License has been revoked by the Secretary of Agriculture. The bill is utterly devoid of allegations that the Secretary of Agriculture has threatened or is threatening to revoke plaintiffs's License. Indeed, under the provisions of Section 8 (3) of the Act, the Secretary of Agriculture has no power to revoke plaintiffs' License, except after notice to the plaintiffs, and a hearing at which they would be given complete opportunity to present every defense or extenuating circumstances which they may have.

General Regulations, Series 3, Article II, promulgated by the Secretary of Agriculture and approved by the President of the United States on August 26, 1933, set forth the elaborate procedure which must be gone through before a License may be suspended or revoked; the Licensee is given a notice to show cause why his License should not be revoked, setting forth the alleged violations; the licensee may file an answer to the charges against him; the Secretary may then dismiss the proceedings if he finds the answer sufficient; if not, a public hearing is held at which the licensee is given full opportunity to appear in person or by counsel and present testimony, cross-examine witnesses, present oral arguments, and file briefs.

The presiding officer at such hearing files with the Secretary his proposed findings of fact and recommendations. The Secretary may then dismiss the charges, or he may revoke or suspend the license, within his discretion.

Only after the Secretary revokes the plaintiffs' License after full compliance with this elaborate procedure can the defendant possibly proceed against them to enforce the fines provided in Section 8 (3). Whether or not such time will ever arrive is wholly conjectural. Certainly neither the plaintiffs nor this court can at this time anticipate, first, that proceedings to revoke the plaintiffs' License will ever be instituted, and second, that if so, the Secretary will exercise his discretion to revoke the License. Even if the Secretary should revoke the plaintiffs' License his action will be subject to judicial review, since Section 8 (3) provides that such order shall be final "if in accordance with law." Thus the possibility of injury to the plaintiffs from the carrying out of the alleged threats of the defendant to prosecute them for their violations of Section 8 (3) of the Act fades from the immediate present to a remote and contingent future. The plaintiffs thus have entire liberty to comply with the License or not without the slightest risk of being forced to pay the fines provided by Section 8 (3) of the Act. It is respectfully submitted that under such circumstances the plaintiffs have utterly failed to show that direct injury which is a necessary prerequisite to their obtaining injunctive relief.

When a discretionary determination by an administrative official (here the Secretary of Agriculture) is a condition precedent to the infliction of the injury which the plaintiff seeks to avoid by injunction, that injury is remote, not direct, and no case for an injunction is made out.

Thus, in Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, the plaintiffs filed a bill to enjoin the Federal Trade Commission from attempting to enforce its orders previously made requiring the plaintiffs to furnish certain information concerning their respective businesses, on the ground that the questions related solely to plaintiffs' intrastate business and hence were beyond the jurisdiction of the Federal Trade Commission. The Federal Trade Commission Act provides that the failure of any person to answer any lawful inquiry, in obedience to the lawful requirements of the Commission, shall be an offense punishable by fine of not more than $5,000. or imprisonment for not more than one year, or both. Enforcement is committed to the Attorney General, either by mandamus or by proceedings to recover the penalties provided for. Although the parties failed to raise the point, the Supreme Court on its own motion, dismissed the bill, and stated that until the Attorney General exercised his discretion to prosecute the plaintiffs, they could not suffer injury:

> "* * * The wide scope and variety of the questions, answers to which are asked in these orders, show the wisdom of requiring the chief law officer of the Government to exercise a sound discretion in designating the inquiries to enforce

which he shall feel justified in invoking the action of the court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor and discussion. The purpose of Congress in this requirement is plain, and we do not think that the court below should have dispensed with such assistance. Until the Attorney General acts, the defendants cannot suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceedings against them. That right being adequate, they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity." (Underscoring ours.)

A precisely similar situation exists here. Unless and until the Secretary of Agriculture exercises his discretion, after a hearing, to revoke plaintiffs' License, the defendant here is powerless to institute proceedings for the imposition of the penalties provided by Section 8 (3) for until such time no violation of the Act has been committed.

Indeed, in the Claire case, the danger of the imposition of penalties upon the plaintiffs was more immediate than in the case at bar, for in the Claire case the Attorney General could have instituted proceedings immediately, whereas in the case at bar, an administrative hearing, the determination of the Secretary to revoke plaintiffs' License, and their continuance of business after revocation of their License must all intervene before the defendant can sue for the penalties.

Chicago Board of Trade v. Olson, (1922) 262 U.S. 1, was a bill in equity brought by the Board of Trade against the United States District Attorney at Chicago, the Postmaster at Chicago, and the Secretary of Agriculture to enjoin them from enforcing the Grain Futures Act on the ground that it was unconstitutional. One section of the Act attacked by the bill provided that after investigation, a hearing and complaint by the Secretary of Agriculture, a Commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General might exclude from all contract markets any person found violating the Act. In affirming the dismissal of the bill the Supreme Court said, at page 43:

> "The plaintiffs do not aver that they are committing acts which will subject them to such exclusion, or that charges have been made and proceedings have been begun or are about to be begun against them by the Secretary of Agriculture. Until they are thus in danger of suffering prejudice from the operation of the paragraph, they cannot invoke our decision as to its validity." (Underscoring ours.)

Similarly, in the case at hand the bill should be dismissed because plaintiffs are not "in danger of suffering prejudice" from any steps the defendant may take under the Act.

(B) The second section of the Act which the bill refers to as subjecting the plaintiffs to penalties which the defendant is allegedly threatening to enforce in Section 10 (c) which provides:

> "The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100. as may be provided therein."

The plaintiffs allege that (1) the "License for Milk - Louisville Sales Area" is a regulation within the meaning of this section of the Act, and (2) that their failure to comply with the License will subject them to a fine not in excess of $100. for each offense. Both of these statements are manifestly erroneous conclusions of law. The License nowhere makes reference to the Secretary's regulations or to Section 10 (c) of the Act. The License does not purport to be a regulation; indeed, its preamble recites that it has been issued "pursuant to Section 8 (3) of said Act." It is submitted that no reason whatever exists for anyone's construing the License as a regulation issued under Section 10 (c) of the Act, when a different section of the Act, to wit, 8 (3) expressly provides for the issuance of licenses of the type in question here, and when the license by its own terms purports to be not a regulation under Section 10 (c) of the Act, but a license issued under Section 8 (3) of the Act. Furthermore, a mere consideration of the ordinary meaning of the terms "license" and "regulation" discloses the inappropriateness of construing the milk license as a regulation issued under Section 10 (c) of the Act. A license has been well defined in Palmetto Fire Ins. Co. v. Baha (D.C. S.D. N.Y.) 13 F. (2d) 500, as "merely a permit or privilege to do what otherwise would be unlawful." An administrative regulation of the type contemplated by Section 10 (c) of the Act, on the other hand, is commonly understood as prescribing a detailed rule of conduct, general in its application, relating to the administration or enforcement of a statute.

Under Section 10 (c) of the Agricultural Adjustment Act the Secretary is authorized to make such regulations "with the approval of the President." The provision requiring the President's approval of such regulations is an integral part of the statutory provision granting the Secretary the power to make regulations, and a purported regulation which had not been approved by the President would be wholly void. The milk license has not been and does not purport to have been approved by the President. It cannot therefore be a regulation within the meaning of Section 10 (c) of the Act, and consequently the defendant is utterly without power to institute any proceeding based on plaintiffs' non-compliance with the milk license which could possibly result in the imposition upon the plaintiffs the penalties provided by the Act for the violation of regulations promulgated under Section 10 (c).

Furthermore, Section 10 (c) provides that "Any violation of any regulation shall be subject to such penalty, not in excess of $100. as may be provided therein." The word "Therein" clearly refers to "Any regulation." That is, unless the regulation itself provides a penalty for its violation, none may be imposed. In no case does the Act itself provide a penalty for the violation of any regulation. The milk License makes no provision whatever for the imposition of any fines or penalties for non-compliance with its terms, hence even if it were construed as a regulation (which it clearly is not) the plaintiffs are in no danger of being subjected to any fines or penalties, and the defendant is utterly without power to prosecute proceedings for the imposition of penalties for non-compliance with the License.

It should be noted that the bill does not allege that the defendant or the Secretary of Agriculture or any other party is construing Section 10 (c) as authorizing the imposition of penalties for non-compliance with the License. Nor is the bill framed on the theory that the defendant is threatening prosecutions not authorized by the statute. The plaintiffs erroneously construe the Act as imposing penalties which it obviously does not attempt to do. The possibility of injury to the plaintiffs resulting from the failure to comply with the provisions of the License is in this respect not only not direct or immediate, but it is entirely illusory.

Since non-compliance with the Licenses cannot possibly subject the plaintiffs to prosecution by the defendant under Section 10 (c) of the Act, there is neither necessity nor occasion for enjoining the defendant, and the suit should be dismissed.

(C) The third and last section of the Agricultural Adjustment Act referred to in the bill of complaint as subjecting the plaintiffs to the imposition of penalties for which the defendant is allegedly threatening to institute prosecutions, is Section 10 (h) which provides that the provisions, including penalties, of Sections 8, 9 and 10 of the Federal Trade Commission Act are made applicable to the jurisdiction, powers and duties of the Secretary in administering the provisions of Title II of the Agricultural Adjustment Act.

Those sections of the Federal Trade Commission Act (15 U.S.C.A. Secs. 48, 49, 50) provide, inter alia, that the Commission shall have power to require by subpoena the testimony of witnesses and the production of documentary evidence relating to any matter under investigation; that upon the application of the Attorney General, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus to compel compliance with these provisions; that any person who shall neglect or refuse to attend and testify or to produce documentary evidence, if in his power to do so, is obdience to subpoena or lawful requirement of the Commission shall be guilty of an offense punishable by fine of not more than $5,000. or imprisonment for not more than one year, or both. Conceding for the purposes of this argument that such penalties sould be applicable to a failure of the plaintiffs to comply with demands which the Secretary of Agriculture <u>may</u> make upon them

to furnish him the reports or the information required to be furnished under the terms of the License, or to produce their books and records for his inspection, the bill falls far short of demonstrating that the plaintiffs are in any immediate danger of being proceeded against by the defendant for such penalties.

The bill does not allege that the Secretary of Agriculture has made, or is threatening to make any demand whatever upon the plaintiffs for any information or for an examination of their books or records. Obviously no offense can possibly be committed by the plaintiffs until such a demand is made by the Secretary, and compliance therewith is refused. It is wholly conjectural that such demand will ever be made. Certainly the defendant will not be enjoined from enforcing this Act when a demand upon the plaintiffs by the Secretary of Agriculture is a condition precedent to institution of an action by the defendant, and there is no allegation in the bill that such demand has been or ever will be made.

The contention of the plaintiffs in this respect is foreclosed by the opinion of the United States Supreme Court in Federal Trade Commission v. Claire Furnace Co. (1927) 274 U.S. 160, referred to above. That case involved the identical statutory provisions (Secs. 8, 9, and 10 of the Federal Trade Commission Act) as are here involved. There the Federal Trade Commission had issued its orders upon the plaintiffs to furnish it certain information, whereas in the bill at bar it is alleged merely that the Secretary of Agriculture may demand information from the plaintiffs. The Supreme Court's decision that the plaintiffs failed to show a case of injury under the facts there involved, a fortiori precludes the granting of relief to the plaintiffs here, whose danger of being subjected to penalties is more remote than was such danger to the plaintiffs in the Claire case. As the Supreme Court stated in that case:

> "Until the Attorney General acts, the defendants cannot suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction. The Bill should have been dismissed for want of equity."

It thus appears that upon analysis of the three kinds of fines or penalties which the defendant is allegedly threatening to enforce against the plaintiffs, not a single one may, under the terms of the Agricultural Adjustment Act, be conceivably inflicted against the plaintiffs at this time. Nor will the continued operation by the plaintiffs of their businesses without complying with the License, without more, subject them to the possibility of having any of these fines or penalties imposed upon them. As has been demonstrated above:

(1) The fines provided by Section 8 (3) of the Act cannot be imposed upon the plaintiffs until after their existing License is revoked by the Secretary of Agriculture in his discretion after notice to the plaintiffs and a hearing, and the plaintiffs continue to do business

after such revocation of their License. The bill does not allege that the Secretary is contemplating taking proceedings to revoke plaintiffs' License or is even threatening to hold the administrative hearing which is necessarily precedent to the revocation of their License.

(2) The fines provided by Section 10 (c) of the Act can never be imposed upon the plaintiffs for non-compliance with the License, because the License is not a regulation, nor is it alleged that the defendant is so construing it.

(3) The fines imposed by Section 10 (h) of this Act can only be imposed upon the plaintiffs after the demand by the Secretary upon them for information (which demand has not been made and may never be made), their refusal to comply with such demand, a request by the Secretary of Agriculture to the Attorney General to institute proceedings (which request is not even alleged to have been threatened) and the discretionary determination by the Attorney General to institute proceedings to collect the fines.

The danger of imposition of the fines imposed by these three sections of the Agricultural Adjustment Act is the only danger of irreparable injury alleged in plaintiffs' bill, and since under a proper construction of the Act plaintiffs are in no danger whatever of being subjected to the imposition of these fines in continuing to operate their business without complying with the License, their case of immediate and irreparable injury utterly fails. The averments of plaintiffs' bill thus fall far short of presenting that exceptional situation justifying the imposition of a court of equity referred to in Cline v. Frink Dairy Co. (1926), 274 U.S. 445:

> "The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safe-guarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate." (Underscoring ours).

The motion for a temporary injunction should be denied and the bill should be dismissed.

II

<u>The District Attorney Cannot Lawfully Be Enjoined Because He Is Not in a Position to Inflict Any Injury upon the Plaintiffs.</u>

Apart fr9m the allegation in plaintiffs' bil that the defenant District Attorney is interpreting section 8 of the Agricultural Adjustment Act "to authorize the licensing of these plaintiffs to conduct their business," whereas the plaintiffs content that the milk License cannot constitutionally be applied to them, the bill nowhere alleges that the defendant is threatening to prosecute the plaintiffs other than in accordance with the provisions of the Act.

But defendant District Attorney has no power to prosecute the plaintiffs under section 8 (3) of the act because the plaintiffs cannot be guilty of handling milk without a License until their existing License is revoked by the Secretary of Agriculture; and such revocation is not even threatened. Unless and until the Secretary shall exercise his discretionary power to revoke plaintiffs' License, after notice and hearing, and the plaintiffs thereafter continue in business, the defendant's hands are tied, and his alleged threats are obviously incapable of execution.

The defendant is similarly powerless with respect to prosecuting the plaintiffs for violation of section 10 (h), which gives the Secretary of Agriculture the powers of the Federal Trade Commission with respect to requiring, among other things information and documents concerning the plaintiffs' business. There can be no violation of this section by the plaintiffs unless and until the Secretary of Agriculture requests such information from the plaintiffs and they refuse compliance therewith. Furthermore, as demonstrated under Part "C" of the preceding point in this brief, the defendant has no power to prosecute the plaintiffs until the Secretary of Agriculture requests the Attorney General to enforce this Section of the Act, and the Attorney General exercies his discretionary judgment in favor of the lawfulness of the request of the Secretary of Agriculture for the information from the plaintiffs.

Thus it is clear that in any case the power to place the plaintiffs in a position to be prosecuted by the defendant, rests not with the defendant but with the Secretary of Agriculture. Since the defendant lacks the power to prosecute the plaintiffs, no injunction should issue against him. It is well settled that a bill to restrain the enforcement of an allegedly unconstitutional statute will lie only against a person or agency to whom the <u>power to enforce the statute</u> is delegated. This proposition of law was involved in <u>Federal Trade Commission v. Claire Furnace Company</u> (1927) 274 U. S. 160 (discussed under point I supra). The Supreme Court approved the dismissal of the bill to restrain the Federal Trade Commission from enforcing its order demanding certain information from the plaintiffs, on the ground that since the power of

enforcement of the order was vested in the Attorney General, no injunction should be issued against the Federal Trade Commission which lacked such power of enforcement.

The Circuit Court of Appeals for the Fifth Circuit had decided this very point in a recent decision involving the Agricultural Adjustment Act,. Yernell et.al. v. Hillsborough Packing Company, et al., Number 7300, decided April 14, 1934, involved a bill for an injunction brought by two Florida fruit shippers to restrain a "Central Committee" appointed under a citrus fruit license from enforcing its orders regulating interstate shipment of citrus fruits. The sole power to enforce such orders was vested in the Secretary of Agriculture, to whom the Committee might report violations of its orders. The Circuit Court of Appeals dissolved a temporary injunction issued by the District Court against the Committee on the ground that the Committee has no enforcement powers and hence its threats of enforcement were futile.

> "There is no averment that the Committee has undertaken or will assume any power beyond that conferred upon it by the License. The bill goes no further than to charge that the Committee threatens and will continue to threaten the complainant with penalties, prohibitions, and confiscation of fruits, it nowhere alleges an intention to carry the threats into execution. According to it, the Committee's activition begin and end in nothing but threats. As the Committee has no power, and so far as appears has not assumed and will not undertake to enforce either the prorate orders or its alleged threats, injunction does not lie against it."

That decision is precisely applicable to the case at hand, for here the District Attorney (in that case, the Control Committee) is powerless to enforce against the plaintiffs the penalties provided by the Act, because the necessarily precedent discretionary determination of the Secretary of Agriculture has not been made and is not even threatened.

Similarly, in Royal Farms Dairy, Inc. v Henry A. Wallace et al., Number 2265, in the District Court of the United Stated for the District of Maryland, decided June 19, 1934, involving a bill by milk distributors to restrain the members of an "Adjustment Fund Committee," appointed under a milk License for the Baltimore area similar to that involved here, from examining the plaintiffs' books on the ground that the plaintiffs' business was wholly interstate, the Court denied a motion for a temporary injunction, on the ground that since the Committee had no power to enforce its orders on the plaintiffs to submit their books for examination, there was no occasion for an injunction:

> "In my opinion the more substantila answer to the plaintiffs' prayer for preliminary injunction aries from the consideration that the defendants apparently have no powers of enforcement under the Act; and the utmost they can do is report the complainants' refusal to the Secretary of Agriculture for his action ... the Judicial Branch of the Government should interfere with the administrative activities of the Executive Department only where

it is clearly necessary to do so to protect individual constitutional rights. The granting of an injunction by a court of equity is an exercise of its extraordinary jurisdiction which ordinarily will not be exerted unless the plaintiff can make a showing of probably irreparable injury, and has no adequate remedy at bar. As the case now stands, it does not seem to me the plaintiff has made out such a case of probable irreparable injury as necessitates the issuance at the present time of an injunction against the defendants."

It is submitted that this case should be of considerable persuasive weight with this Court, involving as it does almost the identical situation presented by the bill in this case.

Since it thus clearly appears that the defendant has no power to inflict upon the plaintiffs the penalties with which he is allegedly threatening them, these threats are idle and the fear they inspire in the plaintiffs is groundless. Under such circumstances there is no occasion for the granting of an injunction against the District Attorney.

The fact is that the proper party to be unjoined (assuming the plaintiffs have any case at all) is the Secretary of Agriculture. His is the power to revoke plaintiffs' License and thus render them amenable to the penalties provided by section 8 (3) of the Act for distributing milk without a license; and his is the power to request information from the plaintiffs under section 10 (h) of the Act, and to request the Attorney General to proceed against them upon their failure to give such information. But the plaintiffs chose to bring their suit in a district in which the Secretary is not amenable to process and to make the only defendant the District Attorney, who is powerless to inflict harm upon the plaintiffs. Under the circumstances disclosed by the bill it is submitted that the plaintiffs' motion for a temporary injunction should be denied and their suit should be dismissed.

III

<u>The Suit is Premature in that the Plaintiffs Have Failed to Exhaust Their Administrative Remedies Before Filing the Bill of Complaint</u>

General Regulations, Series 4, Revision 1, Article VI, promulgated by the Secretary of Agriculture and approved by the President of the United States on January 3, 1934, provide as follows:

> "Sec. 600. If any person licensed under this act, or any person affected by such license, considers himself aggrieved by any term or condition of such license, or by the operation or effect thereof upon his business, such person may file with the Secretary a written application for modification thereof, setting forth the grounds therefor; and thereafter the Secretary shall, when it appears to the Secretary from the face of the complaint that it is not without merit, set the complaint down for a hearing."

Sections 601 to 605, both inclusive, of said Article describe in considerable detail the full, ample, and adequate hearing which may be had by plaintiffs or other licensees "or any person affected by such license" who "considers himself aggrieved by any term or condition of such License, <u>or by the operation or effect thereof upon his business</u>".

The sections of Article VI, last referred to, provide for a hearing by a presiding officer to be appointed by the Secretary and the mode and manner of procedure to be followed. The procedure provides for the introduction of evidence both for and against the application for modification of the License and for the right of counsel to be heard. The presiding officer, at the conclusion of the hearing, "shall make proposed findings of fact and shall report the same to the Secretary together with his recommendation and the record of the proceedings. The Secretary shall thereafter render his decision and shall enter an order modifying the License, if he so decides, or denying the application to modify the License. The order may contain findings of fact of the Secretary and such order shall be filed in the office of the Chief Hearing Clerk and shall there be available for public inspection * * * the Secretary shall take such action upon such application to modify as will, in the judgment of the Secretary, tend to effectuate the declared object of the Act." (sec. 604)

A reading of these sections discloses provision for a full, complete and adequate hearing available to any licensee or "person affected by such license" who considers himself "aggrieved by any term or condition of said license, or by the operation or effect thereof upon his business."

The bill of complaint fails to allege that the plaintiffs, or either of them, have sought to avail themselves of any of the above administrative remedies. This is so despite the fact that the License here involved became effective on June 1, 1934, and that the bill of complaint in this cause was filed on June 15,1934. Plaintiffs, therefore, had ample opportunity to petition the Secretary for the relief to which they claim they are entitled. This is not a case where plaintiffs have invoked a court of equity to afford them relief from a situation which threatened imminent and irreparable damage before they could secure administrative relief. On the contrary, they ignored these regulations which were made by the Secretary of Agriculture and approved by the President of the United States. Section 10 (b) of the Act provides that the regulations made by the Secretary and approved by the President shall have "the force and effect of law."

We contend, in view of all of these provisions safeguarding the rights of the plaintiffs, that the proceedings herein were precipitously begun and the bill of complaint was prematurely filed.

Under circumstances much less clear than these, courts have repeatedly held that they will not anticipate the hearing and the final ruling of an administrative body. Courts will not presume that Governmental officials, vested with authority to grant relief, will act either unreasonably or illegally. From this proposition there seems to be no dissent whatever.

In Gilchrist v. Interborough Co., (1929) 279 U. S. 159 the Supreme Court, through Mr. Justice McReynolds, went out of its way to point out that Federal Courts must avoid even the appearance of anticipating the action of administrative officials or commissions, even where a strong showing is made as to what the probable action of such officials will be. The case goes much further than the present situation. The owner of subway lines in New York City claimed that the existing rate was confiscatory, and filed schedules for a hearing before the Transit Commission, as provided by law (a step omitted by the plaintiffs in the case at bar). It was also alleged that the members of the Transit Commission were of the opinion that no relief should be granted to the Company and that they had used threatening language indicating that action would be immediately taken against it. The original bill, asking that the Transit Commission be enjoined, was filed at 9:20 A. M. February 14th. Later the same morning the Commission denied relief, and directed action against the Company.

It will be noted that in that case the only thing left for the Commission to do was to enter an order. The subway company had complied with the provisions of the statute relating to seeking a hearing before the Commission, and actually had good reason to believe that such an application would be futile. Further than that it was only a matter of a few hours before the Commission did act as anticipated. Yet the Supreme Court took occasion to point out that even under those circumstances federal courts must not short circuit hearings provided by law, and anticipate the action of the administrative

officials before such action becomes final. Even the appearance of such procedure must be avoided. The Court said (pp. 208-209):

> "Under the doctrine approved in Prentis v. Atlantic Coast Line, 211 U. S. 210, 231, and Henderson Water Company v. Corporation Commission, 269 U. S. 278, the Interborough Company could not have resorted to a federal court without first applying to the commission as prescribed by the statute. And having made such an application it could not defeat orderly action by alleging an intent to deny the relief sought."

The case stands out the more sharply because at the time the injunction was granted by the lower court against the Transit Commission, the Commission had already acted. It was not a mere guess what the Commission would do. In addition to that a supplemental bill had been filed by the plaintiff alleging that such action had been taken.

In the face of this case the plaintiffs come before this Court asking for injunctive relief in advance of a hearing by the Secretary of Agriculture without even making a request for a hearing, or alleging, as the plaintiffs did in the Interborough Case, that the hearing was a mere formality.

So numerous are the decisions and so well settled is the principle of law that injunctive relief cannot anticipate administrative action that no more than passing reference need be made to some of the more recent and familiar expressions of the courts to that effect. Since the well-known opinion of the Supreme Court of the United States in Prentis v. Atlantic Coast Line (1908), 211 U. S. 210, this principle has been frequently announced.

In the present term of the Supreme Court, for example, at least three decisions may be appropriately invoked. United States et al. v. Illinois Central R. R. Co. et al., Number 422, decided March 5, 1934; The Pacific Telephone and Telegraph Co. v. City of Seattle et al., Number 364, decided February 5, 1934; and P. F. Peterson Baking Co. et al. v. Bryan et al., Number 203, decided January 8, 1934. In the Illinois Central case, it was said:

> "The constitutional question raised by appellees, therefore, vanishes from the case, because the commission concedes and stands ready to grant every administrative procedural right that appellees are lawfully entitled to claim. If the preliminary order be erroneous in any particular, it is susceptible of correction by the commission upon the hearing thus provided for. It will be time enough for appellees to seek the aid of a court of equity when they shall have fully availed themselves of this administrative remedy, and the commission shall have taken adverse action. Until then they are in no situation to invoke judicial action." (Underscoring ours.)

In Porter v. Investors Syndicate (1931), 286 U. S. 462, the Supreme Court reversed a decree of the District Court enjoining enforcement of an order of the Blue Sky Law Commissioner of Montana forbidding the issuance of certificates. The order had been issued after a hearing and after the commissioner had asserted his intention to revoke plaintiff's permit. The plaintiff had not availed himself of the statutory appeal from the Commissioner to the State Court. In refusing injunctive relief the Supreme Court stated: (p.471)

> "Under the Montana statute the administrative proceeding is not complete until the court (referring to the Montana Court) shall have acted in revision and correcting of the commissioner's decision. It would be strange indeed if the commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative procedure existed. We cannot so read the act in the absence of clear and unambiguous phraseology requiring that course * * *." (Underscoring ours.)

The point is finally and definitely expressed in the recent opinion of the Supreme Court in White v. Johnson (1931, 282 U. S. 367, where, at page 373, the Court said:

> "It would be subversive of all established principles were courts, in litigation between parties, who have reciprocal rights under the Constitution, to settle their controversies by broad statements to the effect that acts of Congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law." (Underscoring ours.)

The allegations of plaintiffs' bill that the defendant and the administrative authorities, the Secretary of Agriculture and his agents, are erroneously interpreting Section 8 of the Agricultural Adjustment Act and the milk License issued thereunder as applicable to the plaintiffs does not relieve them from the effect of these decisions. For even if the defendant and the Secretary of Agriculture are in error in their construction of the Act (which, of course, is not admitted by the defendant) the administrative remedies afford the plaintiffs an ample opportunity to persuade the Secretary of Agriculture of his alleged error.

In South Porto Rico Sugar Company v. Munos (C.C.A. 1st Circ. 1928) 28 Fed. (2d) 820, a bill was filed to enjoin a Public Service Commission from interfering with plaintiff's water franchise, after the Commission had issued an order to show cause why the franchise

should not be cancelled, on the ground that the Commission had no jurisdiction over the plaintiff in this respect. The Circuit Court of Appeals affirmed the dismissal of the bill on the ground that the suit was premature and stated:

> "If we assume for the moment that this Public Service Commission has no jurisdiction, the issuance of an order of notice was no such assertion of authority or threat of irreparable injury as to warrant injunctive interference by the court. It would not follow that, on appearance and argument, the commission would adhere to an erroneous view as to the nature and extent of its jurisdiction."

Nor does the plaintiffs' contention that the application to them of Section 8 of the Act exceeds the constitutional powers of Congress to regulate interstate commerce afford them the right to obtain injunctive relief without first exhausting the administrative remedies open to them. Jurisdictional objections based on constitutional limitations must first be made to the proper administrative agencies before the official or body whose action is complained of may be enjoined, when, as here, administrative remedies are available.

In Chamber of Commerce v. Federal Trade Commission, 280 Fed. 45 (C.C.A., 8th Circ., 1922) plaintiff raised the constitutionality of the Federal Trade Commission Act before proceeding with a hearing by the Commission, on the plausible theory that this would save useless expense if the Commission had no constitutional power to regulate in any way either the parties or subject matter. (In the case at bar no such separate question of the constitutional power to regulate the subject matter under the Act can be raised because the general power of Congress to regulate interstate commerce by administrative action is so clearly established.) No doubt recognizing that injunctive relief before a hearing by the Federal Trade Commission had already been denied (see Hurst & Son v. Federal Trade Commission, 268 Fed. 874 (D.C.E.D. Va. 1920)), plaintiff attempted to review the preliminary question by a writ sounding both in certiorari and prohibition-- the two common law writs historically used to review general questions of jurisdiction. The Court however, refused to permit the hearing before the Commissioner to be short circuited by this ingenious device, stating its conclusion as follows (p. 48):

> "The real gist of the complaint here is that it is claimed and with plausibility, that the chief petitioner is not subject to the jurisdiction of the Federal Trade Commission; that the commission is proceeding erroneously and in excess of its powers; that the taking of the testimony before a final order can be made will be very expensive; and that a grievous burden is being inflicted upon petitioners, for which an ultimate setting aside of any order that may be

made will not adequately compensate them. This is true in some degree of any order of the commission which may finally be set aside. <u>The law does not contemplate that commissions of this nature will act arbitrarily nor without probable cause. It is, of course, conceivable that they may do so; but such a possibility cannot justify this court in exceeding its statutory powers and authority</u>. To do so would be to deny to the administrative and legislative branches of the government the powers and authority which have been conferred upon them and which have been uniformly upheld by the courts."

In fairness to the Court reference should here be made to <u>Yarnell et al v. Hillsborough Packing Company et al</u> (C.C.A. 5th Circ.), discussed, supra, in which the court on this point said:

> "Appellees attack the Control Committee's orders as being null and void, and so they had the right to apply to the court for relief in the first instance."

It should be noticed, however, that in the <u>Yarnell</u> case, the Circuit Court of Appeals did dissolve the temporary injunction on the ground that the plaintiffs made no showing of injury. Moreover it is submitted that the language of the court quoted above is inconsistent with the other decisions discussed herein.

As we have demonstrated in point I of this brief, the plaintiffs are at perfect liberty to conduct their businesses as they please without running any risk of being subjected to the imposition of penalties. The admininistrative remedies provided by the regulations are ample and adequate and this court will not presume that the Secretary will not fairly and conscientiously administer them so as to give the plaintiffs all relief to which they are entitled. Under these circumstances we contend that the failure of the plaintiffs to exhause their administrative remedies makes their suit premature, and the cases discussed herein require the denial of their motion for a temporary injunction and the dismissal of the bill.

We respectfully urge that this point is of considerable importance in the administration of the Agricultural Adjustment Act; that an orderly, efficient administration of the Act requires persons affected thereby to pursue their departmental remedies and not to rush into courts with injunctions. A deluge of injunction suits may follow if this court holds that the Secretary of Agriculture is not permitted to enjoy the usual rights and powers conferred upon administrative officers to first settle matters within his own Department before the complainants are entitled to relief in equity.

IV.

It Would Be Improvident to Grant a Preliminary Injunction Under the Circumstances of the Case

Under the points previously made in this brief we have presented our contentions that the bill should be dismissed because it fails to state a case entitling plaintiffs to any relief. If so, it is obvious that no occasion for a temporary injunction appears.

We now urge in addition thereto that because of the public interest involved in the continued operation of the milk License for the Louisville Sales Area, as compared with the insignificance of the plaintiffs' need for a temporary injunction, it would be improvident to grant plaintiffs this relief. The regulation of markets for milk distributed in the current of interstate commerce, as is done by the License here involved, is an important mode of effectuating the declared policy of Congress to remove the obstructions of the normal currents of such commerce caused by the existing disparity between the prices that farmers obtain for their products and the prices which they must pay for industrial products. To permit a minority of the milk distributors operating in the Louisville Sales Area to enjoin the enforcement of the License as against them is to destroy the entire marketing plan, for it is obvious that the most just and efficient plan for stabilization of a market cannot survive if even a small group in the industry is permitted to disregard the plan. It is only upon the clearest showing of the unconstitutionality of a statute the enforcement of which is sought to be enjoined, and of great and immediate injury which the refusal of such relief will entail, that the Judicial branch of the Government will interfere to stay the operation of the mandate of Congress for even a temporary period.

In Dryfoos v. Edwards, 284 Fed. 596 (D.C.S.D.N.Y., 1919; affirmed 251 U.S. 146), a temporary injunction was sought to prevent interference by the Collector of Internal Revenue and the District Attorney with the withdrawal and sale of liquor contrary to the provisions of the War Time Prohibition Act, on the ground that the Act was unconstitutional.

Judge Learned Hand upheld the constitutionality of the statute and denied the injunction. Complainant urged that even though the court considered the Act constitutional it should, nevertheless, grant an interlocutory injunction pending appeal, since the injury to complainant in not being able to sell the beer in its warehouses, or to use its large plant would be so great as to be irreparable. This point was overruled, Judge Hand saying (p. 603):

> "The damages done by an injunction meanwhile cannot be measured in money, as in the case of Cotting v. Kansas City Stockyards (C.C.), 82 Fed. 857. Here is a question of national public policy, of allowing

the sale of what the constituted authorities apparently regard as injurious to the public, or to so much of it as they have the right to consider. To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not. In all the books we are told that to declare a statute unconstitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute till the case be finally decided. Assuming that I may do so, there seems to be no proper reason for exercising the power." (Underscoring ours.)

And the same idea was expressed in Hannah & Hogg v. Clyne (D.C.N.D. Ill. 1919) 263 Fed. 599, involving a similar suit to restrain enforcement of the same statute:

"If individual loss, incidental to a proper exercise of the police power of the Government is not to be compensated for, this court knows of no reason why plaintiffs would have a temporary injunction pending appeal. What Congress has done is in the interest of public welfare and public morals. If plaintiffs, not entitled to compensation, the prohibition laws being valid, may sell and distribute their product among the people of the country, the damage to the general welfare has been done, and never can be undone. If the action of Congress was wise, and so we must assume it to be, believing the Prohibition Act to be lawful, even were the question here involved doubtful, we would have to resolve the doubt in favor of the Government." (Underscoring ours.)

And in Railroad Commission v. Central of Georgia Ry. Co. (C.C.A. 5th.Circ., 1909) 170 Fed. 225, in which the Circuit Court of Appeals dissolved a temporary injunction issued by the District Court against the enforcement of a statute fixing railroad rates, the court said:

"It is urged by the complainants that the temporary injunction was properly issued because required to protect their property rights. That contention assumes a disputed assertion to be true. If no one else was concerned, the courts might yield to that view without much hesitation. But the passengers and shippers, if, strictly speaking, they have no property interest involved, have a pecuniary interest in the enforcement of the rate laws. So there are rights on both sides deserving careful thought. And the public has an interest in the enforcement of every

law until it is repealed or judicially annulled. The courts should, of course, with strong hand protect property from all unlawful invasion, but they should not be so engrossed by that thought and duty as to forget the rights of others, whether property rights or not." (Underscoring ours.)

And so here. To annul the declared will of Congress even temporarily is to inflict upon the public an irreparable injury far greater than any that may conceivably befall the plaintiffs by the denial of a temporary injunction.

In this connection the attention of the Court is called to the thoroughly established proposition that there is a strong presumption in favor of the constitutionality of an Act of Congress.

Erie Railway Co. v. Williams, 233 U. S., 685.
Coppage v. Kansas, 263 U. S. 1.

The burden of clearly demonstrating the unconstitutionality of the Agricultural Adjustment Act is on the plaintiffs here, since they contend that the Act is invalid.

Erie Railway Co. v. Williams, 233 U. S. 685.
Mountain Timber Co. v. Washington, 244 U. S. 219.
Middleton v. Texas Power Co., 249 U. S. 152.

The courts will not declare a statute unconstitutional unless such unconstitutionality has been established beyond all reasonable doubt:

Adkins v. Children's Hospital, 261 U. S. 525.

If there was any conceivable state of facts existing at the time of the passage of the Act which will sustain its constitutionality, the courts will presume that such a state of facts existed and that Congress was aware of it.

Rast v. Van Deman Co., 240 U. S. 342.

And the presumption of constitutionality of the Act should weigh even more heavily upon an application for temporary relief, as here, prior to a full hearing on the merits of the case. In such a situation, it is submitted, the court will be most reluctant to grant a preliminary injunction and thus declare a statute unconstitutional at a preliminary stage of the case.

Furthermore, the Agricultural Adjustment Act, and in particular section 8 (3) thereof, has been held constitutional in five decisions (three of them by one Judge):

Economy Dairy v. Wallace (D.C. Sup.Ct. 1933), 1 U. S. Law Week 9.

Beck v. Wallace (D.C. Sup. Ct. 1933), 1 U. S. Law Week 9.

United States v. Calistan Packers (D.C.N.D. Cal. 1933) 1 U. S. Law Week 85.

Capital City Milk Producers Assn. v. Wallace (D. C. Sup. Ct. 1933) 1 U. S. Law Week 197)

United States v. Shissler, et al. (D.C.N.D. Ill. 1934) Number 13803, decided April 14, 1934.

Compare:
Edgewater Dairy Company et al. v. Henry A. Wallace, et al (D.C.N.D. Ill., 1934) Number 13878, decided June 26, 1934

It is submitted, therefore, that considering the duty of the Court to indulge in every presumption in favor of the constitutionality of the Agricultural Adjustment Act, it would be improvident to issue a temporary injunction on behalf of the plaintiffs.

V.

THE AGRICULTURAL ADJUSTMENT ACT AND THE LOUISVILLE MILK LICENSE ISSUED PURSUANT THERETO ARE CONSTITUTIONAL

Under the preceding points of this brief, we have argued that irrespective of the constitutional questions raised by the plaintiffs in this case, the plaintiffs have wholly failed to state a case entitling them to relief in a court of equity. We confidently submit that the arguments which we have there made are decisive of this case and require the dismissal of the bill of complaint.

However, even if this Court should determine that the bill of complaint states a cause of action on its face and therefore should not be dismissed, the plaintiffs would still not be entitled to interlocutory relief by a preliminary injunction unless it should clearly appear from the record in this case as now made that the Louisville Milk License is unconstitutional.

The only facts now before this Court in support of plaintiffs' contention that the License is unconstitutional are those alleged in their petition. The Government has filed a lengthy affidavit in this case setting forth the economic facts which are not denied by any allegation of the petition and which we submit establish (1) that all of the milk in the Louisville Sales Area is in the current of interstate commerce and (2) that the License is reasonable and does not violate the due process clause of the Fifth Amendment. The Government contends that upon the record so made by the petition of plaintiffs and the affidavit filed on behalf of the Government, the plaintiffs not only have failed to meet the burden of establishing the unconstitutionality of the Louisville Milk License, but that it affirmatively appears that the Louisville Milk License is constitutional. Hence, we submit that even though this Court should decide the preliminary questions heretofore argued in this brief adversely to the Government, nevertheless, plaintiffs' motion for a preliminary injunction must be denied on the ground that it clearly appears from this record that the Louisville Milk License is constitutional.

The bill of complaint attacks the constitutionality of the Louisville Milk License on the following two grounds:

1. That the License is not a regulation of interstate commerce, and hence that the Federal Government is without power to issue the License under the commerce clause of the Federal Constitution.

2. That the License violates the due process clause of the Fifth Amendment of the Constitution.

Under this point of our brief we shall show:

(1) That under the facts set forth in the affidavit filed by the Government herein, with respect to interstate commerce in milk in Louisville, and upon the principles enunciated by the Supreme Court of the United States, all of the milk sold in the Louisville Sales Area is in the current of interstate commerce; hence that the Louisville Milk License is a proper regulation of interstate commerce, as applied both to the plaintiffs and to all other milk distributors in Louisville.

(2) That the Louisville Milk License is a reasonable and appropriate regulation in the public interest and does not violate the due process clause of the Fifth Amendment.

A

THE AGRICULTURAL ADJUSTMENT ACT AND THE LOUISVILLE MILK LICENSE ISSUED PURSUANT THERETO ARE A PROPER EXERCISE OF THE FEDERAL COMMERCE POWER TO REGULATE INTERSTATE COMMERCE.

The plaintiffs attack the Louisville Milk License upon the grounds that the regulation of the dairy industry therein provided for is beyond the power of the federal government under the Constitution to regulate interstate commerce. The petition alleges that all of the plaintiffs are engaged in doing wholly an intrastate business; that they purchase and sell all of the milk handled by them within the State of Kentucky, and upon this ground urge that their business is not subject to regulation by the Federal government, but that the power to regulate is reserved to the state.

The government has filed an affidavit in this case setting forth the facts with respect to interstate commerce in milk in the Louisville Sales Area. It is our contention that upon the facts there set forth and under the decisions of the Supreme Court of the United States, the regulation of the dairy industry in the Louisville Sales Area provided for in the License is a proper exercise of the power of the federal government under the commerce clause of the Constitution. More specifically, we shall show under this point of our brief:

1. That all of the milk handled by distributors in the Louisville Sales Area is in the current of interstate commerce, and hence that all distributors in the Sales Area are subject to regulation by the federal government, irrespective of whether or not any particular distributor is himself engaged in transporting milk across state lines.

2. That the primary regulation provided for in the Louisville Milk License--fixing the price of milk to be paid to producers--is a proper regulation of interstate commerce.

3. That the ultimate objective of Congress in passing the Agricultural Adjustment Act was to increase the national flow of interstate commerce by increasing farm purchasing power, and that the Louisville License, in accomplishing this purpose, is a proper regulation of interstate commerce.

4. That the provisions of the License fixing the minimum resale prices are necessary for the purpose of maintaining the price to the producer and to remove obstructions to the flow of interstate commerce in milk in the Louisville Sales Area and hence, that such provisions are a proper regulation of interstate commerce.

ALL OF THE MILK DISTRIBUTED IN THE LOUISVILLE SALES AREA IS IN THE CURRENT OF INTERSTATE COMMERCE. HENCE, ALL DISTRIBUTORS IN SUCH AREA ARE SUBJECT TO REGULATION UNDER THE FEDERAL COMMERCE POWER WHETHER OR NOT THEY, THEMSELVES, ARE ENGAGED IN DOING AN INTERSTATE BUSINESS.

Section 8 (3) of the Agricultural Adjustment Act provides that the Secretary may issue licenses to processors and others engaged in handling "in the current of interstate or foreign commerce" of agricultural commodities or products thereof. The Government submits that the facts set forth in the economic affidavit filed by it in this case conclusively establish that all of the milk which is handled in the Louisville Sales Area is in the current of interstate commerce. This affidavit sets forth the following facts which are not denied by any allegation of the petition and therefore stand admitted upon this record:

1. The territory within which milk is produced for sale in the Louisville Sales Area is interstate in character and includes portions of the States of Indiana and Kentucky.

2. Substantial quantities of milk, averaging in excess of 19,000 pounds per day, which are produced in the State of Indiana, are transported in interstate commerce into the State of Kentucky and there sold in the City of Louisville. The milk produced in Indiana and sold in Louisville, Kentucky, is of the same grade and quality as Kentucky milk which is sold in Louisville and competes therewith.

3. The Louisville Sales Area, as defined in the License, is itself interstate in character, embracing not only the City of Louisville but the Fort Knox Military Reservation and the Cities of New Albany and Jeffersonville in the State of Indiana. Milk shipped into Louisville from Indiana and Kentucky becomes mingled in the channels of fluid milk distribution, and distributors located in Kentucky sell approximately 45,000 pounds of milk monthly in the Indiana cities embraced in the Louisville Sales Area. The milk transported from Kentucky to Indiana and there sold to consumers competes with the Indiana milk which is sold in these cities.

4. Six million pounds of butter and two million pounds of cheese are shipped into Louisville annually from other states. Six million quarts of evaporated milk are likewise shipped into Louisville from Wisconsin and Indiana. These dairy products manufactured from milk produced outside of Kentucky and Indiana and shipped in interstate commerce into Louisville compete with manufactured products made from milk produced locally. In addition, thirteen million pounds of butter, manufactured in large part from milk produced locally, is shipped out of the Louisville Sales Area annually and transported in interstate commerce to southern and middle western states. Cheese likewise is transported from

the Louisville Sales Area in large quantities as are cream and evaporated milk.

5. It would be economically impossible to fix the price to be paid to Indiana milk producers supplying that portion of the Louisville Sales Area situated in Kentucky, without regulating the price to be paid to Kentucky producers who supply their milk to the Kentucky portion of the Sales Area. Similarly, it would be economically impossible to fix the price to be paid to Kentucky producers whose milk is sold in Indiana, without likewise fixing the price to be paid to Indiana producers whose milk is likewise sold in that state. An attempt to require an increased price to be paid to one group of milk producers whose milk happens to cross state lines without requiring an equal increase in the price paid to producers whose milk is sold in the state where it was produced would result in the complete demoralization of the market. The effectiveness of any price regulation with respect to any group of producers would be destroyed and would be unenforceable if other producers selling the same product in the same competitive area were to receive a different price.

The Government submits that in the light of the foregoing facts which clearly demonstrate that a large portion of the milk and other dairy products purchased and sold in the Louisville Sales Area actually moves in interstate commerce, either before or after the time when it reaches the hands of the distributor, and that all such milk and dairy products are in competition with each other and with intrastate milk and dairy products, the entire Louisville market is in the current of interstate commerce.

The fact that the plaintiffs themselves are engaged in wholly an intrastate business, or that the transaction sought to be regulated (the purchase of milk from producers) occurs within the boundaries of a single state, does not place such regulation outside of the limits of the Federal commerce power, where, as here, the practice sought to be regulated has an immediate and direct effect upon interstate commerce. Thus in Stafford v. Wallace, 258 U. S. 495 (1922) the Supreme Court of the United States upheld the validity of the Federal Packers & Stockyards Act as a proper regulation of interstate commerce. This it did, notwithstanding the fact that the Act regulated transactions of commission merchants, dealers and packers which, of themselves, were purely intrastate in character, including the regulation of commissions and charges made by them for handling livestock. In upholding the Act as a proper regulation of interstate commerce, the Supreme Court said:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of

Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

The Stafford case was followed by the case of Tagg Bros. & Moorhead v. U. S., 280 U. S. 420 (1929), in which the Supreme Court specifically upheld a regulation of the Secretary of Agriculture under the Packers & Stockyards Act, fixing the commission which might be charged by commission men in the Omaha Stockyards, as a proper regulation of interstate commerce. See also Chicago Board of Trade v. Olsen, 262 U. S. 1 (1923), where the Court upheld the Grain Futures Act regulating transactions on the Chicago Board of Trade, notwithstanding the fact that such transactions themselves are wholly in intrastate commerce.

Thus the Supreme Court of the United States has never hesitated to sanction the control of intrastate business by Congress wherever such control is necessary to permit the effective exercise of the paramount power of Congress over interstate commerce. The scope of the doctrine is strikingly illustrated in the decisions of the Court in cases arising under the Anti-trust Laws, where the Court sustained the control by Congress of purely local activity which did not compete with interstate activity upon the grounds that such intrastate activity burdened and affected the interstate activity.

Thus in United Mine Workers v. Coronado Coal Company, 259 U. S. 344 (1922), the Court held that the Anti-Trust Laws were applicable to and forbade a strike among coal miners notwithstanding that the business of mining coal is a purely local activity. The basis for the decision of the Court was that such a strike, by preventing the mining of coal diminished the supply of coal moving in interstate commerce and thus burdened and affected interstate commerce in coal. In so holding, the Supreme Court said (Page 407):

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In Hammer v. Dagenhart, 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce. We have had occasion to consider the principles governing the validity of congressional restraint of such indirect obstructions to interstate commerce in Swift & Co. v. United

States, 196 U. S. 375; United States V. Patton, 226 U. S. 525; United States v. Ferger, 250 U. S. 199; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co. 275 U. S. 563; and Stafford v. Wallace, 258 U. S. 495. It is clear from these cases that if Congrees deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint."

For similar decisions upholding the application of Anti-Trust Laws to purely local activities, see Loewe, v. Lawler, 208 U. S. 274 (1926); Bedford v. Stone Cutters Association, 274 U. S. 37 (1927); Local 167, etc. v. U. S. 59 Sup. Ct. 396 (February 5, 1934).

The facts set forth in the Government's affidavit in the case at bar present an even stronger case for the right of the Federal Government to regulate the business of distributors in the Louisville Milk Market who are engaged in purely intrastate activities. For here, not only do such intrastate activities burden and affect interstate commerce in milk in the Louisville Sales Area, but it appears from the facts alleged in the affidavit itself, that intrastate transactions in milk are so inextricably intermingled with interstate transactions in milk in the Louisville Sales Area, that it would be wholly impossible to regulate such interstate transactions unless the intrastate transactions were likewise regulated. The facts set forth in such affidavit clearly disclose that milk produced outside of the state of Kentucky is sold for consumption within the state and likewise, that milk produced within the state is sold for consumption outside of the state. It is perfectly clear, under the circumstances, that it would be economically impossible to fix the price which farmers residing outside of Kentucky are to receive for their milk which is sold in Louisville without likewise regulating the price which Kentucky producers receive for their milk. If such regulation were attempted, producers residing outside of Kentucky would be forced to sell under the fixed price in order to maintain their competitive position in the market, and even if strict enforcement of the fixed price regulation were possible, its sole result would be to eliminate foreign producers from the Kentucky market and so render nugatory the interstate regulation. Under such circumstances the Supreme Court of the United States has held that the federal power to regulate interstate commerce applies not only to transactions which are in themselves interstate but also those intrastate transactions whose regulation is necessary in order to permit the effective regulation of the interstate transactions.

In the Minnesota Rate Cases, 230 U. S. 399 (1913), the Supreme Court in discussing the power of the Federal Government to fix intrastate Railroad Rates said (Page 399):

> "There is no room in our schemes of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; <u>and the full control by Congress of the subject committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations</u>. This is not to say that the Nation may deal with the internal concerns of the State, as such, <u>but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter</u>. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In the <u>Houston East & West Texas Railway Co. v. U. S.</u>, 234 U. S. 342 (1914) the Supreme Court sustained the power of the interstate commerce Commission to fix intrastate rates where it was shown that unless such power was sustained, interstate shippers would be forced to pay rates disproportionately high as compared with the rates paid by intrastate shippers. In so holding, the Supreme Court said (Page 351):

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, <u>it is Congress, and not the State that is entitled to prescribe the final and dominant rule</u>, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation would be supreme within the national field."

To the same effect see <u>Illinois Central Railroad Company v. Public Utilities Commission</u>, 245 U. S. 493 (1914); <u>Wisconsin Railroad Commission v. Chicago Burlington & Quincy Railroad Company</u>, 257 U. S. 563 (1922); <u>New York v. United States</u>, 257 U. S. 591 (1922). See also the following cases which sustained the applicability of the Federal Appliance Act to injuries received by an employee engaged in intrastate commerce by reason of a defective car likewise engaged wholly in intrastate commerce:

> <u>Illinois Central Railroad Co. v. Behrens</u>,
> 233 U. S. 473 (1919), and
>
> <u>Texas & Pacific Railway Co. v. Rigsby</u>,
> 241 U. S. 33 (1916).

The specific question here discussed--the right of the Secretary of Agriculture under a milk license issued pursuant to the Agricultural Adjustment Act, to regulate the business of milk distributors engaged wholly in intrastate commerce--has recently been decided in favor of the Government by the district court for the northern district of Illinois. In the case of United States v. Shissler (Decided May, 1934) the court specifically held that all of the milk sold in the Chicago milk market is in the current of interstate commerce and hence that the Secretary of Agriculture has the authority to fix the price of all such milk whether produced outside of the State of Illinois and actually transported in interstate commerce, or whether produced within the state itself. In so holding the court said:

> "It is charged in the bill of complaint, also, and not denied, that it is impossible to regulate the business of purchasing, selling, distributing and handling milk shipped from states other than the State of Illinois into the Chicago Sales Area for consumption therein without regulating the business of purchasing, selling, handling and distributing milk produced in the State of Illinois for consumption in the Chicago Sales Area; that not less than forty per cent of all the milk sold as whole milk within such area is produced outside the State of Illinois; that the cream sold in the Chicago Sales Area in 1933, came from milk produced in fourteen different states, and that only 28.8% of such milk was produced in the State of Illinois and that an attempt to require an increased price to be paid to milk producers who are non-residents of Illinois for milk sold for consumption in the Chicago Sales Area without requiring an equal increase in the price paid to Illinois producers for similar milk would result in complete demoralization of the market; that to maintain their position in the Chicago market producers outside the State of Illinois would be forced to engage in a price war with Illinois producers. These conclusions of the pleader are evident truths. It would be impossible for the Secretary of Agriculture to maintain a standard of prices for non-resident producers whose milk was consumed in the Chicago Sales Area if the price to producers in Illinois was left unregulated. There is no escaping the finding of the Secretary set forth in the license that the intrastate and interstate transactions are so inextricably intermingled that the interstate commerce in fluid milk in the Chicago Sales Area cannot be effectively regulated without regulating that

portion which is intrastate.

> The power of Congress to regulate intrastate commerce when the situation becomes such by reason of the interblending of the interstate and intrastate operations that adequate regulation of the particular commerce between the states cannot be maintained without imposing requirements with respect to intrastate transactions which substantially affect interstate transactions of like character seems to be well settled. Minnesota Rate cases, 230, U. S. 352, Houston & Texas Ry. Co. v. United States, 234, U. S. 342; Georgia Public Service Commission v. United States, 283, U. S. 765; State of Alabama v. United States, 283, U. S. 776; United States v. Louisiana, 290 U. S. 70.
>
> In the first two cases above cited the issue presented was whether the intrastate rates of an interstate carrier could be regulated when by reason of the interblending of its interstate and intrastate operations adequate regulation of its interstate rates could not be maintained without regulating its intrastate business. But in Georgia Public Service Commission v. United States, 283 U. S. 765, supra, the Court sustained a general order concerning intrastate rates which was applicable to all carriers whether operating interstate or solely intrastate lines. Following the Minnesota Rate cases, Congress in 1920 by paragraphs 3 and 4 of Section 13 of the Interstate Commerce Act authorized the Interstate Commerce Commission to fix rates and fares for intrastate transportation whenever it could find that the rate fixed by a State or State Commission gave an undue preference and advantage to intrastate over interstate traffic. And the power of Congress to regulate intrastate rates under such circumstances has not been questioned."

For the foregoing reasons we respectfully submit that all of the milk handled in the Lousiville Sales Area is in the current of interstate commerce and therefore, that the business of handling such milk is subject to regulation by the federal government whether or not the particular distributor in question is himself actually engaged in interstate transactions.

2.

FIXING THE PURCHASE PRICE OF MILK WHICH IS IN THE CURRENT OF INTERSTATE COMMERCE IS A PROPER REGULATION OF INTERSTATE COMMERCE.

Under the preceding section of this point we have shown that all of the milk in the Louisville Sales Area is in the current of interstate commerce and hence subject to regulation by the federal government under its constitutional power over interstate commerce. The particular form of regulation employed by Congress under the Agricultural Adjustment Act and the Louisville Milk License, issued pursuant thereto, is to fix the price which distributors are required to pay producers for milk purchased. We submit that under the authorities it is clear that such price-fixing of a commodity which is in the current of interstate commerce is a proper regulation of interstate commerce under the commerce power.

The Supreme Court of the United States has squarely held that the federal government has the power to fix the purchase price of a commodity which moves in interstate commerce; that such price-fixing is clearly a regulation of interstate commerce and hence is within the exclusive province of the federal government.*

In Lemke v. Farmers Grain Co., 258 U. S. 50 (1922) the Supreme Court of the United States considered the constitutionality of a statute of the State of North Dakota which regulated the business of purchasing grain from farmers within that state. It appeared that a very large percentage of such grain was shipped in interstate commerce outside of the state after its purchase. The statute in question permitted the purchase of grain only by licensed buyers; required the payment of State charges; provided for a system of grading, inspection and weighing, and further fixed the price to be paid for grain purchased by a buyer in the State. The Court held the statute invalid upon the ground that it was an attempt by the State to regulate interstate commerce in derogation of the paramount power of the Federal Government. It was argued in support of the statute that the State merely attempted to regulate commerce in grain, before the interstate journey commenced, and, therefore, while such grain was still in intrastate commerce. The Court, however, stated that none of its previous decisions had indicated that interstate commerce does not include the buying and selling of products for shipment beyond State lines. Further the Court says (Page 58):

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*Under a subsequent point of this brief we shall show that the fixing of the price to be paid to producers for milk does not violate the Due process Clause of the Fifth Amendment to the Constitution. Under this point we limit ourselves to establishing that Congress has the power to fix such prices under the Commerce Clause.

"Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce."

The proponents of the legislation further argued that it was in the interests of the grain growers and essential to protect them "from fraudulent practices, and to secure payment to them of fair prices for the grain actually sold." In reply to this contention the Court said (Page 61):

"This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under Federal control."

Thus, in holding invalid the North Dakota statute which sought to fix the price farmers were to be paid for their grain, the Court expressly held that such power to fix prices (with respect to commodities moving in interstate commerce) was specifically reserved to the Federal Government under the Commerce Clause of the Constitution.

The power of the Federal Government to fix the price of an agricultural commodity which moves in interstate commerce, was thus specifically passed upon and upheld by the Supreme Court, in the Lemke case. It is precisely this power which Congress has exercised in the Agricultural Adjustment Act, and which the Secretary of Agriculture has executed under the Louisville Milk License with respect to milk sold in the Louisville Sales Area.

The doctrine of the Lemke case, that the fixing of the price to be paid for a commodity which moves in interstate commerce, is a matter for Federal Regulation under the commerce power, was repeated by the Supreme Court with approval in a decision rendered as recently as February 1934, and applied by it with respect to the fixing of prices of commodities at the end of the interstate journey. Local 167 I. D. T. etc. v. U. S., 291 U. S., 293, 297, 78, L. Ed. 506, the Court said (Page 508):

"But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement

ends may operate directly to restrain and monopolize interstate commerce."

See also Stafford v. Wallace and Tagg Bros. and Moorhead v. U. S. cited supra, in which the Supreme Court of the United States specifically upheld those provisions of the Packers and Stockyard Act, which authorized the Secretary of Agriculture to fix the commissions and charges of commissionmen and dealers in livestock.

We submit, therefore, that the foregoing decisions of the Supreme Court clearly establish that the fixing of prices of commodities at the beginning or at the end of their interstate journey, is clearly within the commerce power of the Federal Government under the Constitution. As we have shown under the preceding section of this point, the fixing of a price to producers in the Louisville market could not be effective if limited only to producers whose milk actually moved in interstate commerce and across state lines. Hence, under the doctrine of the cases we there cited, it follows that the federal power to fix prices for milk extends not only to milk which physically moves in interstate commerce, but to milk which moves wholly in intrastate commerce as well. The right of the Secretary of Agriculture to fix producer prices for milk under a milk license issued pursuant to the Agricultural Adjustment Act, was specifically upheld by the district court for the northern district of Illinois in the case of U. S. v. Shissler, supra. The Court said:

> "It is indicated by defendants that the Agricultural Adjustment Act is invalid. The defendants say that it is beyond the power of Congress, in the exercise of the authority granted to it to regulate Interstate Commerce, to fix the price at which a commodity may be bought or sold. But the power of Congress to regulate Interstate Commerce by Clause 3 of Section 8 of Article One of the Constitution has no limitations other than those that may be found in the Constitution itself. Except as prohibited by some other provisions in the Constitution, Congress has complete and unlimited power. Gibbons v. Ogden, 9 Wheat. 197. McDermott v. Wisconsin, 288 U. S. 115.

THE PURPOSE OF THE AGRICULTURAL ADJUSTMENT ACT AND THE LOUISVILLE MILK LICENSE IN FIXING THE PRICE TO BE PAID TO FARMERS FOR MILK, IS TO INCREASE THE NATIONAL FLOW OF INTERSTATE COMMERCE.

In the preceding section of this point we have shown that it is within the power of Congress to fix the price of an agricultural commodity which moves in interstate commerce. Under the cases which we there cited, the purpose of Congress in making such regulation is immaterial as far as the question of its power so to do under the Commerce Clause is concerned. It would, therefore, be unnecessary for the purpose of our present point to consider the ultimate objective which Congress had in mind in the passage of the Agricultural Adjustment Act. We wish, however, to point out to the Court that not only is the particular regulation (the fixing of prices to producers) contemplated by the Agricultural Adjustment Act and applied in the Louisville Milk License an appropriate regulation of interstate commerce, but that the ultimate objective of Congress in adopting this legislation was to remove obstructions to and so increase the national flow of interstate commerce.

There is no need for conjecture as to the condition which Congress decided to remedy by the passage of the Agricultural Adjustment Act or the mechanism which it adopted to remedy that condition. The statute itself answers both questions. It expressly declares that an acute emergency exists throughout the Nation; that a severe and increasing disparity exists between the return the farmers receive for their products and the prices which they must pay for industrial products; that this disparity has broken down and made impossible the orderly exchange of commodities and has burdened and obstructed the normal currents of commerce in such commodities.

In effect, the statute recites that the national flow of interstate commerce has fallen to an alarmingly low level, and declares that it is the purpose of Congress, through the Agricultural Adjustment Act, to secure the farmer an increase in price for his commodities. But, such increased price is secured for the farmer only for those commodities which enter into the current of interstate commerce. Further, Congress, by enacting this legislation, intended to secure for the farmer an increased purchasing power to the end that he in turn, by increasing his purchases, might help increase and restore the national interstate commerce to its normal volume. The purpose of Congress in enacting this legislation was therefore (a) to secure to the farmer a greater return on commodities produced by him which move in the current of interstate commerce, and (b) to increase the national flow of interstate commerce for the benefit of the entire nation.

The condition which faced the nation on May 12, 1933, the date of the passage of the Agricultural Adjustment Act, the predicament of the

entire farm population, and the drying up of interstate commerce owing in part to the impairment in the purchasing power of the farmer, is graphically and accurately set forth in the Government publication entitled "The Economic Bases of the Agricultural Adjustment Act" which we have presented to the Court. One of the means adopted by Congress to alleviate this crisis, one of the corner stones of the entire recovery program, was the passage of the Agricultural Adjustment Act, which provided a means for increasing the purchasing power of the farmer and thereby increasing the free flow of interstate commerce. This purpose clearly appears from the face of the Statute itself. Whether Congress was right or wrong in the economics of its reasoning is beside the point here. See Stafford v. Wallace, supra.

Not only has the fixing of prices under the Louisville Milk License directly benefited the farmer by increasing the price of his product and so increased his purchasing power and the national flow of interstate commerce, but it has corrected marketing conditions prevailing in the dairy industry which, as stated in the affidavit filed by the government, have led to unfair competitive practices on the part of distributors, and serious and continued price wars, resulting in a price for milk lower than that justified by the supply and demand situation existing even during this period of depression. The power of Congress by legislation to correct competitive practices in interstate commerce, which in its opinion are detrimental to the interstate commerce of the nation, has long been recognized by the Court in cases dealing with the Anti-Trust Laws. At the time of the adoption of the Anti-Trust Laws, it was the opinion of Congress that free and unrestricted competition was a wise and wholesome situation for all commerce, and that the national prosperity required that such free competition be maintained. The Courts did not then inquire into the soundness of the economic theory thus adopted by Congress but upheld the Anti-Trust Laws as a proper exercise of the commerce power. Thus in Northern Securities Co. v. U. S. 193. U. S. 197 (1904) the Court said:

> "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in those days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment

of Congress the public convenience and the general welfare will be best subserved when the national laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be for all, the end of the matter, if this is to remain a government of laws, and not of men."

As appears from the face of the Agricultural Adjustment Act, Congress has now found that the forces of free competition with respect to agricultural commodities, are if unrestricted not in the interest of the national prosperity. It has, therefore, in order to promote the national prosperity and the free flow of interstate commerce, enacted the Agricultural Adjustment Act for the purpose, among others, of curbing such competitive practices. The Louisville Milk License, by fixing prices to producers eliminates unfair competitive practices among distributors, which resulted under a regime of unrestrained competition, in beating down the price of milk to the producer.

4.

THE MINIMUM RESALE PRICES PROVIDED FOR IN THE LICENSE ARE NECESSARY FOR THE EFFECTIVE REGULATION OF PRODUCER PRICES AND ARE THEREFORE A PROPER REGULATION OF INTERSTATE COMMERCE.

Under the preceding points of this section, we have shown that the provisions of the License which fix the price to be paid to producers for their milk is a proper exercise of the power of the Federal Government to regulate interstate commerce. In addition to fixing the price to the producer, which is, as we have seen, the primary objective of the Louisville License, the License also establishes a schedule of minimum resale prices below which milk may not be sold at retail. The Government submits that the fixing of minimum resale prices in the Louisville market is essential to the maintenance of the fixed producer price and hence, is a proper regulation of interstate commerce as a necessary incident to the exercise of the federal commerce power to fix producer prices.

The government affidavit filed in this case sets forth facts which clearly establish that the minimum resale prices are a necessary incident to the effective establishment and maintenance of the producer prices provided for in the License. The affidavit states that one of the effects of the present economic depression upon the dairy industry has been to bring about price wars and destructive competition among distributors and has reduced the amounts which dairy farmers receive for their milk below the price justified by the supply and demand situation. The affidavit further states that the purpose of the minimum

resale price schedule of the License is to prevent such unreasonable price cutting, the result of which would be to demoralize the market and to make it impossible to maintain the producer price, since the distributors in the course of such a price war would inevitably tend to shift the burden of their destructive competitive practices upon the producer. The affidavit further analyzes the minimum resale price schedule from which it clearly appears that the minimums set forth in the License, when compared with the producer prices provided for therein, result in a considerably smaller spread to the distributor than prevailed prior to the issuance of the License. Thus, these minimum resale prices were designed and fixed for the sole purpose of making effective the producer price regulation provided for in the License. This fact is demonstrated by the license provision which permits any distributor who is of the opinion that the minimum resale prices are higher than those required to maintain producer prices to make application to the Secretary of Agriculture for a modification of the resale price schedule.

In addition to the foregoing, the affidavit states that the price cutting practices which the minimum resale prices are designed to prevent may endanger the supply of milk needed to meet fluid milk requirements. It thus clearly appears that such price cutting directly and immediately affects interstate commerce in milk in the Louisville Sales Area, and the price of milk to the producer which, as we have shown, is a proper regulation of interstate commerce. Hence, under the authorities cited and argued under section 1 of this point of the brief, the Federal Government may properly fix minimum resale prices for the purpose of removing obstructions to the free flow of interstate commerce and for the purpose of effectuating its regulation of interstate commerce by fixing producer prices. Stafford v. Wallace, supra; Tagg Bros. & Moorhead v. U. S., supra; Board of Trade v. Olsen, supra; United Mine Workers v. Coronado Coal Co., supra.

B.

<u>THE LOUISVILLE MILK LICENSE, WHICH FIXES THE PRICE OF MILK TO BE PAID TO PRODUCERS, IS A REASONABLE AND APPROPRIATE REGULATION OF THE DAIRY INDUSTRY AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.</u>

Under the preceding section of this point, we have shown that the Federal Government has the power under the commerce clause of the Constitution to fix the price which distributors must pay to producers for milk distributed in the Louisville Sales Area and further, to fix a minimum resale price at which such milk may be sold in the Louisville Sales Area. Plaintiffs, however, further object to the license upon the ground that, even though it is a proper regulation of interstate commerce, it is nevertheless unconstitutional for the reason that it violates the due process clause of the Fifth Amendment of the Constitution. It is the contention of the Government that the Louisville License does not deny due process to the plaintiffs or any of them, but on the contrary, that it is a reasonable and valid regulation of the dairy industry. In stating our argument on this point, we shall assume, as we have shown above, that the License is a proper exercise of the Federal commerce power.

It should be noted at the outset that where the Supreme Court of the United States has found, in a particular case, that the regulation in question was within the power of the Federal Government to regulate interstate commerce, it has seldom questioned the validity of such regulation under the due process clause of the Fifth Amendment. See <u>Adair v. United States</u>, 208 U. S., 161 (1908); <u>Louisville & Nashville Railroad v. Mottley</u>, 219 U. S., 467 (1911).

However, assuming that Congress in the exercise of the commerce power is limited in its legislation by the due process clause of the Fifth Amendment 1/, we shall show that the Louisville License does not, in any of its provisions, violate such due process clause.

More specifically, we shall first indicate the economic facts which confronted Congress at the time of the enactment of the Agricultural Adjustment Act and which made necessary for the protection of the public interest the regulation of agriculture and more specifically of the dairy

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1/ Clearly Congress is not more restricted by the Fifth Amendment than the state legislatures by the Fourteenth. The Supreme Court of the United States frequently cites cases arising under the due process clause of the Fourteenth Amendment, in its decisions upon the due process limitation upon Federal legislation and vice versa. See, for example, <u>Nebbia v. New York</u> 54 Sup. Ct. Rep. 505 (1934) where the Court discusses the due process question under both the Fifth and Fourteenth Amendments as being identical. For this reason some of the cases cited under this point involve the validity of state legislation, but the principles there discussed are equally applicable to legislation by the Federal Government.

industry, for the purpose of increasing farm purchasing power. We shall then show that in the light of these circumstances and because of these conditions which Congress so found to exist, the fixing of the price which distributors of milk must pay to milk producers is a proper and a valid regulation under the due process clause. We shall further show that such being the case, and it being found necessary to fix minimum resale prices, in order to secure and maintain a fixed price to the producer, that the fixing of minimum resale prices is also a reasonable and proper regulation.

We shall further show, in answer to the specific objections which the plaintiffs make to the License that:

(1) The so-called equalization pool or market pool imposes no burden upon distributors in addition to that of paying a fixed price to the producers. It is a necessary and appropriate incident to the fixing the price of milk paid to producers.

(2) Since the fixing of milk prices does not violate the due process clause, the provision of the License abrogating all prior contracts inconsistent therewith does not deny due process to the plaintiffs.

(3) The requirement of the License that all distributors post bonds or give other adequate security to secure their payments to producers is clearly a proper and constitutional regulation.

1. AGRICULTURE IN GENERAL AND THE DAIRY INDUSTRY IN PARTICULAR ARE VITALLY AFFECTED, IN THE PRESENT ECONOMIC EMERGENCY, WITH A PUBLIC INTEREST. THE GENERAL WELFARE AND THE PUBLIC INTEREST IN THE DAIRY INDUSTRY JUSTIFY ITS REGULATION BY CONGRESS.

The purpose of Congress in enacting the Agricultural Adjustment Act is evident when the economic condition which confronted this country at the time the Act was passed is considered. At the end of 1928, the major industrial countries of the world found themselves near the peak of an industrial boom which had created a world-wide orgy of speculation in securities and uneven distribution of income. In major branches of industry, saturated markets made further expansion increasingly difficult. There was evidence of weakening in the commodity price structure.

In 1929, the international lending, upon which much of the world's commercial and industrial activity had been reared, was suddenly withdrawn and put to more spectacular uses in the securities market. The cost of credit arose to alarming heights, checking commercial activity. In the summer of 1929 industrial production in the United States began to recede from its peak. Then followed the famous crash in the securities market in October 1929.

A series of heroic efforts to prevent the downward sweep followed the stock market crash. Interest rates were sharply lowered. Industrialists

were urged by the President to maintain wage rates. Funds were made available to ex-service men. Open market operations were increased by the Federal Reserve Board. Nevertheless, unemployment continued, consumers' incomes failed, commodity and security prices reached new lows. The national credit structure began to weaken.

In 1930 self-protection induced many countries to erect additional trade tariff barriers and to conserve bank resources, further obstructing free exchange of goods by eliminating normal markets.

In the summer of 1931, in spite of a moratorium on foreign debts, the continuous credit strain brought on a series of central bank crashes in Europe and a flight of capital which eventually forced England to abandon the gold standard in September 1931. In the last of 1931 and the beginning of 1932, gold was exported from the United States in huge quantities.

There followed a wave of bank failures in the United States and a continuing flight of reserves. To counteract the resulting contraction of credit, open market operations were instituted on a greater scale than before. Financial measures were adopted amending the Federal Reserve Act but the downward sweep of the depression continued, bringing apprehension concerning the banking structure. Complete loss of public confidence followed, withdrawals increased at an alarming rate and by March 4, 1933, the entire national banking system collapsed.

Forced by this climax in the national disaster, the United States Government began to formulate the present recovery program. Among many of several Acts passed in quick succession was the Agricultural Adjustment Act, enacted May 12, 1933.

The relationship between the plight of agriculture and the severe economic emergency existing at the time of the passage of the Agricultural Adjustment Act is recognized by Congress in its Declaration of Emergency set forth in the Act. The statute expressly declares that an acute economic emergency exists throughout the nation; that such economic emergency in part is the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of the farmer for industrial products; and that this disparity has broken down the orderly exchange of commodities and has seriously impaired the agricultural assest supporting the national credit structure; and that such conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, rendering imperative the immediate enactment of the Act.

The facts above set forth and the findings made by Congress in the declaration of emergency which is a part of the Agricultural Adjustment Act are matters of common knowledge. The Supreme Court in several cases has taken notice of the existence of the present economic emergency "which dominates contemporary thought."

Atchison, etc. Ry. Co. v. United States, 284 U. S. 284 (1932); Home Building & Loan Association v. Blaisdell, 290 U. S. 398 (1934); Nebbia v. New York, 54 Sup. Ct. Rep. 505 (1934);

For a further statement of the economic emergency which confronted the agriculture of the country at the time of the passage of the Act, we call the Court's attention to the Government publication entitled "Economic Bases of the Agricultural Adjustment Act", which we are presenting to the Court herewith and to "Legal Planning for Agriculture", 42 Yale Law Journal 878.

The declaration of emergency contained in the Act is, in effect, a finding by Congress that the welfare of the farmers is so intertwined with the national welfare that it is necessary to increase farm purchasing power in order to remedy the evils of the depression. Following this declaration of emergency, the Act contains a declaration of policy which specifically states that it is the purpose of the Act to increase the purchasing power of the farmer by reestablishing farm prices at a level which will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of such agricultural commodities during the pre-war period, 1909-1914. In other words, Congress has expressly found and stated that one of the necessary remedies for the depression is an increase in farm purchasing power.

The national interest in agriculture is co-extensive with the national interest in the dairy industry. The affidavit of E. W. Gaumnitz which the Government has filed in this case shows that milk is the most important of all farm commodities and that 25% of the total farm income of the United States is derived from dairy products. In addition, the dollar value of dairy products sold in the United States is in excess of that derived from our most important industrial products, steel and automobiles. The production and distribution of milk in the states of Kentucky and Indiana, as well as in the country as a whole, is a paramount industry which largely affects the health and prosperity of the people.

The disastrous effects of the depression upon the dairy industry at large and in Kentucky and Indiana in particular, are set forth in full in the Government's affidavit above referred to from which it clearly appears that unless regulatory measures are adopted to assure dairy farmers a fair and reasonable price for their products, a large and important portion of the farm population of the country will be deprived of its livelihood, its purchasing power will be seriously impaired and the health and safety of the people which depend in a large measure upon a constant, pure and adequate supply of fresh milk, will be endangered.

The importance of the dairy industry has further been recognized and is demonstrated by state and local statutes and ordinances affecting the production and distribution of milk. Many states and almost every municipality in the country have passed measures regulating the health and sanitary requirements for the production and distribution of milk. In addition, a number of state legislatures have recently enacted legislation, similar in its purpose to the Agricultural Adjustment Act

and the Louisville Milk License, to assure to farmers a fair return for their milk production. (See legislation in the states of New York, Connecticut, New Jersey, Pennsylvania, Ohio and California.)

The Agricultural Adjustment Act is based upon the vast body of economic research which has been promoted during the last decade by the United States Department of Agriculture and other institutions, in their efforts to familiarize farmers with the underlying supply and demand factors affecting prices. With this body of research before it, Congress passed the Agricultural Adjustment Act. The passage of the Act was preceded by legislative hearings at which representative from all interested groups were heard 1/.

By the enactment of the Agricultural Adjustment Act Congress declaredly adopted a specific economic policy: To increase the purchasing power of the American farmer. Under the terms of the Act that policy is to be executed in part through the issuance of licenses, pursuant to Section 8 (3) of the Act. As the Supreme Court of the United States has often held, it is not for the courts to pass upon the wisdom or folly of an economic policy adopted by Congress. The scope of the judicial review of a legislative determination of an economic policy has been most recently stated by the Court in the case of Nebbia v. New York, supra, where Mr. Justice Roberts said:

> "So far as the requirements of due process is concerned and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The Courts are without authority either to declare such policy, or when it is declared by the legislative arm, to over-ride it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. ***"

See also Northern Securities Co. v. United States, 193 U. S., 197,337 (1904) supra.

1/ See hearings on "Agricultural Emergency Act to Increase Farm Purchasing Power", before the Committee on Agriculture and Forestry, U. S. Senate, 73d Congress, First Session, on H. R. 3835, and hearing on "Agricultural Adjustment Program" before the Committee on Agriculture, House of Representatives, 72d Congress, Second Session. For Congressional debates see Congressional Record, Vol. 77, passim.

2. THE SPECIFIC REGULATION PROVIDED FOR IN THE LICENSE, FIXING THE PRICE OF MILK PURCHASED FROM PRODUCERS TENDS TO EFFECTUATE THE DECLARED POLICY OF THE ACT BY INCREASING FARM PURCHASING POWER. SUCH PRICE FIXING IS NOT A VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

We have shown in the preceding section of this point that agriculture as a whole and the dairy industry, its most important subdivision, are vitally affected with a public interest, and that Congress in order to protect and foster such public interest, passed the Agricultural Adjustment Act for the purpose of increasing the purchasing power of the farmer. The fact that the dairy industry is private in its character does not remove it from the realm of regulation by the Government, but the existence of the public interest in such business makes it subject to reasonable regulation in the interest of the public welfare.

In the case of Nebbia v. New York, supra, the Supreme Court of the United States sustained a statute of the State of New York, pursuant to which the price paid to producers for milk and the price at which it was sold to consumers were fixed by the New York Milk Control Board. The regulation of the dairy industry by the State of New York was in all material respects identical with the regulation imposed by the Louisville Milk License, pursuant to the Agricultural Adjustment Act. In discussing the power of the government to regulate a private business as against the due process clause of the Fifth and Fourteenth Amendments, the Supreme Court said:

> "The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *. The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."

See also Noble State Bank v. Haskell, 219 U. S. 104 (1911); German Alliance Insurance Company v. Lewis, 233 U. S. 389 (1914)

(The exhaustive discussion contained in the Nebbia case and the full citations therein, make it unnecessary to cite any additional cases in support of the foregoing principle.)

In addition the Supreme Court has decided in a number of cases that the existence of an emergency which seriously threatens the welfare of the community may make reasonable a greater sacrifice of individual liberty than could be exercised within constitutional bounds under ordinary circumstances. In Wilson v. New, 243 U. S. 332 (1917), Congress, faced by the dange of a strike which would have paralyzed the transportation system of the country, enacted a law prescribing hours and wages for employees of interstate carriers. The Court upheld such statute, stating (Page 348):

> "* * *Although an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exercise of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce, may be, by anticipation, legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by the failure of employers, and employees to agree as to the standard of wages, such standard being an essential pre-requisite to the uninterrupted flow of interstate commerce."
>
> See also Block v. Hirsh, 256 U. S. 135 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921) Levy Leasing Co. v. Siegel, 258 U. S. 242 (1922).

So also in Home Building and Loan Association v. Blaisdel, supra, the Court took judicial notice of the state of the country and reaffirmed its willingness to allow the Legislature to broaden its discretion in the face of the community's emergency and the timesof economic stress.

Under the foregoing authorities it is clear that the dairy industry is not exempt from regulation in the interest of the public welfare, particularly in the face of the present emergency, and that the sole demand made by the due process clause of the Fifth Amendment is that such regulation shall not be "unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be obtained."

As we have shown, the object sought to be obtained by Congress, as expressly stated in the Act, is to increase the purchasing power of the farmer. The means selected to obtain that result for the dairy industry in the Louisville area was the issuance of the License pursuant to Section 8 (3) of the Act, fixing the price which distributors must pay to producers for milk purchased. Clearly the means here employed have a direct and immediate relation to the object sought to be obtained. The plaintiffs, however, challenge the validity of the price-fixing provision of the License on the grounds that such price-fixing is beyond the limits of regulation permitted under the due process clause of the Constitution.

The right of the Government to fix prices, where price-fixing is necessary for the protection of the public welfare, has been squarely upheld by the Supreme Court of the United States in Nebbia case, supra. We repectfully submit that the decision of the Supreme Court in that case finally disposes of the plaintiffs' contention that the price-fixing provisions of the Louisville Milk License violate the due process clause of the Fifth

Amendment. As we have noted above, the statute of the State of New York involved in the Nebbia case authorized the Milk Control Board to fix the price which distributors were required to pay to producers for milk purchased. The statute further authorized the Board to fix the price at which milk might be re-sold by distributors to consumers. Pursuant to the statute, the Board fixed both producer and re-sale prices. The defendant in the Nebbia case challenged the fixed re-sale price upon the ground that the fixing of prices was beyond the power of the State under the due process amendment. Although the only portion of the New York regulations squarely involved in the Nebbia case was the right to fix re-sale prices, the Court in a sweeping opinion, upheld the entire New York Act and specifically held that price-fixing is a proper regulation where the public welfare requires it. In reaching this conclusion the Supreme Court said:

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, <u>appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at the one end of the series and the consumer the other</u>." (Italics ours.)

In a second case arising under the New York Milk Control Act, a three-judge Federal Court sitting in New York specifically upheld the constitutionality of the regulation of the New York Milk Control Board fixing the price to be paid to producers. <u>Heggeman Farms Corporation v. Baldwin et al</u>, 6 F. Supp. 297 (1934). The plaintiff dairy company, in that case alleged that the price fixed by the New York Milk Control Board would compel them to do business at a loss and hence would eliminate him from business. No such allegations are contained in the petition in the case at bar. But despite the showing made by the plaintiff in the Heggeman case, the Court upheld the producer price fixed by the Milk Control Board. In answering the contention made by the plaintiffs, the Court (speaking by Mr. Justice Learned Hand) said:

> "It must be apparent that such a doctrine will have wide effects. All sorts of regulations may affect the price of materials or machinery necessary to another industry. The elimination of fire hazards may require high rents; they may not be attainable. The observance of sanitary regulations in factories may be expensive; more than the market will bear. Conformity with prescribed standards of quality and packing may turn a living profit into a loss. Excise taxes are a part of manufacturing costs; the buyer can not always be made to absorb

them and the added load may drive out some producers. Workmen's compensation or a change in employers liability may prove the straw which breaks the camel's back. If the plaintiff be right, in every case the validity of the regulation would depend upon whether the addition to the cost resulted in the elimination of some of the producers. Legislation could scarcely go on at all if its indirect results, its final incidence, must be so nicely adjusted. Nor does it follow that it ought to be. Surely, it is a mild assumption that the more vital interest in the end may demand that there should be lean goods sold at higher prices rather than that all existing manufacturers should remain in business. He would be a hardy exponent of non-interference who should assert the opposite today; if, for instance, the rise in cost was due to improvements in working conditions, or in the hygienic quality of the product. The purpose served by fixing the price of a raw material may be as imperative as either of these; certainly it is not the function of a court to set the hierarchy of social values. In the past, it is true, there were at times expressions in the books which seemed to say that one kind of governmental purpose would justify interference where another would not. The "police power" was sometimes spoken of as though it concerned only "health and safety". That mode has disappeared; the purpose of the State of New York to preserve its dairy industry may involve remote repercussions as mortal to some individuals, as its purpose to abolish sweatshops; but once it be agreed that the state may interpose for either end in the "free play of supply and demand," the incidents follow. It is not critical that some will find themselves unable to understand the pressure and will collapse."

The constitutionality of the milk license for the Chicago Sales Area issued by the Secretary of Agriculture under the Agricultural Adjustment Act, has been specifically upheld as against the due process objection by the District Court for the Northern District of Illinois, Eastern Division, in the case of U. S. et al. v. Shissler et al, supra. The substantive provisions of the Chicago License are substantially the same as those contained in the Louisville License in the case at bar. In holding that the Chicago License was valid and reasonable and did not violate the due process clause of the Fifth Amendment, the Court said:

"The only other provision in the Constitution which in any way limits this power of Congress is the Fifth Amendment which contains the provisions that no person shall be deprived of life, liberty or property without due process of law.

"Does this limitation prevent Congress in the exercise of the power to regulate Interstate Commerce from fixing prices in a period of emergency? This court is not required to search for an answer to this question. The answer has been given by the

Supreme Court of the United States in Nebbia v. People of the State of NewYork, decided March 5, 1934. The Court there held that the statute of the State of New York creating a Milk Control Board with power to fix maximum and minimum prices to be charged by the store to consumers, and the action of the Board in fixing the price of nine cents per quart did not contravene the due process clause of the XIVth Amendment. That an emergency does now exist requiring the fixing of the price of milk to the producer is found and declared by Congress in the Act passed May 12, 1933, (46 Stat. 31, U.S.C.A. Tit. 7, Ch. 28) and the court may take judicial notice that the emergency exists."

We respectfully submit that the foregoing decisions conclusively establish the constitutionality of the provision in the Louisville License fixing producers' prices for milk purchased. The plaintiffs have not in their petition attacked such prices as being unreasonable or arbitrary. The Government, nevertheless, wishes to call the attention of the Court to the affidavit of E. W. Gaumnitz filed herein, in which the License prices are thoroughly analyzed and from which it appears that such prices (a) tend to achieve the declared policy of the Agricultural Adjustment Act by a gradual adjustment or prices toward the parity level as defined in the Act; and (b) were very carefully calculated, having in mind competitive conditions and consumptive demand.

3

THE PROVISIONS OF THE LICENSE WHICH FIX RE-SALE PRICES ARE NECESSARY IN ORDER TO MAINTAIN THE PRODUCER PRICE AND ARE REASONABLE

In addition to fixing producer prices, the Louisville License likewise fixes a minimum re-sale price at which distributors may sell their milk. We respectfully submit that the Nebbia case cited and quoted from, supra, is conclusive of the right of the Government to fix such minimum resale prices as against the due process attack. Under the preceding sections of this brief we have shown that the fixing of producer prices for milk is in harmony with and in execution of the declared policy of Congress as stated in the Act, and that such price fixing is valid and does not violate the due process clause. It appears from the affidavit of E. W. Gaumnitz, which was filed by the Government herein, that it is necessary, by reason of competitive conditions in the Louisville market, to fix minimum re-sale prices in order to prevent price wars and price-cutting which would undermine the whole producer price structure provided for in the License. It further appears from this affidavit that the minimum re-sale prices fixed in the License are no higher than necessary to effectuate the fundamental purpose of the License - the fixing and maintenance of producer prices. Nothing in the License forbids or prevents distributors from selling at prices in excess of the minimum prices fixed in the License. As appears from the Government affidvait, distributors who sell at such minimum prices will have a considerably smaller profit margin than the profit margin prevailing in the Louisville area prior to the issuance of the License. In addtion, the License itself specifically provides that any distributor who believes that

the minimum re-sale prices are higher than necessary for the purpose of maintaining producer prices is entitled to a hearing before the Secretary of Agriculture on the question of the modification of such resale price schedule. The License itself thus provides an adequate safeguard against and a complete remedy to cure minimum re-sale prices in excess of those necessary to accomplish the fundamental purpose of the License - the maintenance of producer prices.

In the light of the foregoing facts, which affirmatively appear upon this record, and under the square decision of the Supreme Court of the United States in the Nebbia case, we confidently submit that the fixing of minimum re-sale prices is a reasonable and appropriate regulation and does not violate the due process clause of the Fifth Amendment.

4

THE SO-CALLED EQUALIZATION POOL OR MARKET POOL PROVIDED FOR IN THE LICENSE IMPOSES NO BURDEN UPON DISTRIBUTORS IN ADDITION TO THE REQUIREMENT THAT THEY PAY PRODUCERS THE LICENSE PRICE. IT DOES NOT TAX ONE DISTRIBUTOR FOR THE BENEFIT OF ANOTHER, IT IS AN APPROPRIATE AND NECESSARY REGULATION AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

The petition of the plaintiffs characterizes the equalization payments provided for in the License as a tax upon one group of distributors for the benefit of another. Based upon this construction of the License, the petition charges that these equalization payments violate the constitutional rights of the plaintiffs. This allegation of the petition indicates a complete misconception of the function and operation of the equalization pool provided for in the License. Such equalization pool, as we shall show, imposes no burden whatsoever upon distributors. It is merely a mechanism for working out the provisions of the License requiring a fixed price to be paid to the producers. The only real obligation which the License imposes upon distributors is that of paying the fixed producer prices. The equalization pool does nothing more than distribute such fixed prices equitably among all producers. In order to understand the true function of the equalization pool, it is necessary to consider briefly the prevailing marketing conditions for milk prior to the issuance of the Louisville Milk License and to analyze the provisions of that License, which very largely incorporate prevailing trade practices.

As we have stated, the fundamental purposes of the Louisville Milk License is to fix the price which producers will receive for their milk. If the commodity, milk, were a simple commodity, the whole License could probably have been expressed in one paragraph. The length of the License and the complexity of its provisions grow out of problems which were present in the dairy industry before the passage of the Act and which were not invented either by the Act or by the License. As appears from the Government affidavit filed in this case, two principal marketing problems in

the dairy industry complicated the execution of the simple purpose of the Louisville License. These two problems are as follows:

1. All of the milk which distributors purchase from producers is not sold by them in the form of whole milk. Most distributors separate a portion of their milk and sell it as cream. Another portion of their milk is manufactured into butter, cheese, or other dairy products, and sold as such. (Milk manufactured into butter or other products is commonly referred to as "surplus" milk.) Milk sold for each of these three purposes is of exactly the same quality and is produced under precisely the same conditions. However, a given quantity of milk realizes a higher price on the retail market when sold in the form of milk than when sold in the form of cream. Likewise, the same quantity of milk which is sold in the form of cream realizes a higher price on the retail market than when manufactured into butter or cheese and sold as such. Thus one hundred pounds of milk of the same quality may net a distributor three different prices, depending upon the form in which it is sold. The highest price is realized for whole milk, a lower price for cream, and a still lower price for butter.

By reason of the foregoing economic fact, a price regulation which established a flat producer price for milk, irrespective of the form in which it is sold by distributors, would place an unfair burden upon distributors. Few distributors know in advance the proportions of their total milk purchases which they will sell in the form of milk, cream, and butter respectively. In addition, no two distributors sell the same portion of their total purchases in the form of milk, cream, and butter. Thus a flat producer price which might be fair and reasonable for one distributor would place entirely too high a milk cost upon another distributor who sold a larger part of his milk in the form of cream or butter.

For this reason, and in order to avoid discrimination among distributors, the first principle recognized by the License is that each distributor shall pay for the milk which he purchases from the farmer at a price dependent upon the use which he makes of such milk. Thus, the Louisville License provides that three prices be paid by distributors:

$2.18 per cwt. for milk sold as whole milk, (Referred to in the License as Class I milk);

$1.65 per cwt. for milk sold in the form of cream, and certain other products having an intermediate retail value, (designated in the License as Class 2 milk);

A price computed on the basis of daily quotations on the Chicago Butter Market for milk manufactured by distributors into butter and other products, (Referred to in the License as Class 3 milk).

The foregoing scheme under which distributors pay for milk only in accordance with the form in which they ultimately dispose of it is commonly known as the "classified price plan". This plan is not new or untried. The License simply incorporates the best trade practices in existence prior to its issuance. During the past ten years distributors

throughout the country, and during the past four years, distributors handling the bulk of the milk in the Louisville Sales Area have entered into marketing agreements with cooperative associations of producers under the terms of which milk purchased by distributors was paid for on the classified price plan, exactly as provided for in the Louisville License.

2. The classified price plan, if uncoupled with a provision for equalizing payments to producers, would obviously discriminate among producers. Under the classified price plan, two producers who supply the same quality and quantity of milk to two different distributors might receive different prices for their milk because of the fact that their respective distributors make different uses of the milk which they purchase. Thus, if one producer supplies milk to a distributor who sells the bulk of his milk in the form of butter, such producer would receive only the low butter price for his entire production. Another producer, on the other hand, producing milk of the same quality but supplying it to a distributor who sells the bulk of his milk in the form of whole milk, would receive the high whole milk price for his entire production. If this situation were permitted to continue, producers would compete with each other to find the most lucrative outlet for their milk; in the course of such competition price wars and price-cutting would invariably develop, so that it would become impossible to maintain a fixed producer price.

To avoid this result the License provides for an equalization pool, the entire purpose of which is to divide the high value milk market in an equitable manner among all producers, and to require all producers to bear their fair share of so-called "surplus" milk, or low use value milk on the market. The equalization pool does not disturb the first principle of the License above stated: that each distributor shall pay for milk on the basis of the use which he makes of it. It simply provides that the total dollar value of milk purchased by all distributors on the market shall be equitably apportioned among all producers on the market.

The Louisville License accomplishes the foregoing result in the following fashion: Distributors are not required to pay producers for milk purchased until the month following the month in which their purchases are made. On the 5th day of each month all distributors are obligated to file reports with the Market Administrator, appointed by the Secretary. Such reports state the disposition which each distributor has made of milk purchased by him during the preceding month. Thus, each distributor is required to report the quantities of milk sold by him during the preceding month in the form of whole milk (Class 1), cream (Class 2), or manufactured products (Class 3). The dollar value of the milk sold by each distributor is then computed in accordance with the prices specified in the License. This dollar value so computed represents the obligation of each distributor on account of his milk purchases. The obligation of each distributor to pay for milk becomes definite and fixed on the basis of this computation.

The total dollar value of all milk purchased by all the distributors on the market is then computed in accordance with the prices specified in the License. Such total dollar value represents the

amount of money which is to be divided among all producers in payment for their milk. Such total dollar value is apportioned among producers in the following manner:

For the purpose of inducing producers to maintain a constant production of milk throughout the year, with little seasonal variation, the total dollar value of all milk purchased by distributors is apportioned among producers in accordance with a so-called "base and surplus plan." (*) Each producer in the market is assigned "an established base." This is simply a figure representing a fixed quantity of milk. The total amount of milk represented by the total of all established bases in the market should tend to equal the total amount of Class 1 and Class 2 sales in the market. No producer is prohibited from producing and selling milk in excess of his established base. Further, frequently an individual producer does not produce an amount of milk equal to his established base. In such case the amount produced and sold is deemed to be such producer's "delivered base."

To determine how the total dollar value of all milk purchased by distributors is to be apportioned among producers, the Market Administrator makes the following computations: The total dollar value of all Class 1 and Class 2 milk sold in the market is divided by the total of the delivered bases of all producers in the market. This computation results in a "blended" price for base milk. Each distributor pays each producer this blended price for an amount of milk equal to the base of such producer. He pays the Class 3, or "surplus" price, for all milk delivered by such producer in excess of his base.

As a result of the foregoing method of payment certain distributors in the market who sell more than the average amount of milk as cream or butter will be required to pay their producers more for milk than its use value to them. Conversely, other distributors who sell more than the average amount of milk as whole milk, will be required to pay their producers less than the use value of such milk to them. Distributors in the second category are required to pay to the Market Administrator the difference between the amount they have paid to their producers and the value of their milk computed on the basis of the use made by them of such milk. These moneys the Market Administrator distributes among distributors of the first category who have paid more for their milk than its use value to them.

Thus the provisions of the License accomplish the following results:

1. Each distributor is required to pay for his milk purchases on the bases of the License prices and only in accordance with the use which he makes of his milk.

(*) The plaintiffs do not attack the provision of the License relating to the base and surplus plan. We refer to it here only for the purpose of indicating to the Court the manner in which payments are made to producers, and to make clear that the equalization pool, of which the plaintiffs complain, does not affect their obligation to pay for milk, but affects only the apportionment of payments among producers.

2. All producers in the market receive a fair price for their milk, irrespective of the use made thereof by the particular distributor whom they supply.

3. The only real obligation imposed on distributors is to pay specified prices for the milk which they purchase, the prices varying in accordance with the form in which such milk is sold. This classified price plan is essentially for the benefit of distributors.

4. The equalization pool imposes no burden on distributors except the duty of submitting reports showing the disposition of the milk which they purchased. It does not tax one distributor for the benefit of another. It is simply a method for apportioning the high value milk market in an equitable manner among all distributors.

The Supreme Court of the United States has given its express approval to the foregoing classified price plan and equalization pool. It has expressly recognized the necessity for this type of regulation. In the Nebbia case, supra, the Supreme Court briefly analyzes the problems above discussed and specifically recognizes the necessity for the solution worked out in the Louisville License. In that case the Court said:

> "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 percent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment."

In the light of the foregoing analysis and under the express language of the Nebbia case, we respectfully submit that the provisions of the License with respect to the equalization pool, attacked by the plaintiffs, are necessary and proper and do not violate the due process clause of the Constitution.

5. THE FACT THAT THE LICENSE BY ITS TERMS SUPERSEDES ALL PRIOR CONTRACTS INCONSISTENT THEREWITH IS NOT A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The plaintiffs attack the constitutionality of the License upon the ground that by its terms the License supersedes all pre-existing contracts inconsistent therewith. The petition alleges that prior to the issuance of the License, "some of the plaintiffs" had entered into contracts with producers for the purchase of milk at prices lower than the prices provided for in the License and that "some of the plaintiffs" had entered into contracts for the sale of milk at prices lower than the minimum resale prices provided for in the License. They therefore charge that the license provisions which supersede these contracts denies them due process.

In answering this argument, it should first be noted that the allegations of the petition with respect to the alleged pre-existing contracts are scanty in the extreme. The petition does not allege which of the thirteen petitioners had entered into such contracts, either with producers or with retailers. It does not allege the dates upon which such contracts were entered into, the length of time for which they were run or the terms and conditions contained therein. However, even if we assume, for the purpose of this argument, that the allegations of the petition are sufficient to show that the plaintiffs will suffer pecuniary loss, by reason of the abrogation of their pre-existing contracts, it is clear, under the authorities, that this fact does not constitute a violation of the due process clause of the Fifth Amendment.

We have shown under the previous sections of this point of our brief that the provisions of the License which fix the producer prices and minimum resale prices are valid and constitutional and do not violate the due process amendment. The law is clear that where, as here, the Federal Government makes a regulation which is reasonable and valid, it is no objection to such regulation that it supersedes pre-existing contracts inconsistent therewith. The provisions of Article 1, Section 10 of the Constitution, prohibiting the states from passing any law impairing the obligation of contracts, is applicable solely to state legislation and is not a limitation upon the power of the Federal Government. This is apparent from the face of the provisions and has frequently been affirmed by the Courts. See Sinking Fund Cases, 99 U. S. 700, 718 (1878); New York v. U. S., 257 U. S. 591 (1922); Bloomer v. Stolley, 3 Fed. Cas. No. 1559 (Cir.Ct.D.Ohio 1850); Hammonds v. Watkins, 262 Pac. 616 (Ariz. 1927); Michigan Central R. Co. v. Slack, 17 Fed. Cas. No. 9527A at 263 (Cir.Ct.D. Mass. 1876); Evans-Snider-Buel Co. v. McFadden, 105 Fed. 293, 297 (C.C.A. 8th 1900); Nortz v. Miller, 285 Fed. 778, 780 (S.D.N.Y. 1921), aff'd 285 Fed. 781 (C.C.A. 2d 1922).

The due process clause of the Fifth Amendment does not prohibit the Federal Government from passing laws which impair the obligation of contracts if such laws are otherwise valid. Such has been the uniform decision of the Supreme Court of the United States.

In Mitchell v. Clark, 110 U. S. 633 (1884), dealing with legislation providing certain defenses to actions brought against public officers for acts done in obedience to orders during the Civil War, the Supreme Court succinctly stated the test to be applied in determining the constitutionality of federal legislation which interferes with prior contracts: (p. 643)

> "Where the question of the power of Congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself."

In the Legal Tender Cases, 79 U. S. 457 (1871) the Court upheld the validity of legislation enacted in the exercise of the currency powers of Congress, requiring that greenbacks be legal tender in payment of all contractual obligations. Explicitly it held "the acts of Congress constitutional as applied to contracts made either before or after their passage." (p. 533). Discussing the power of Congress to impair contractual obligations, it stated: (p. 549)

> "Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts."

It is in the exercise of its power to regulate commerce that Congress has perhaps most frequently acted to nullify the provisions of existing contracts. This is illustrated by cases upholding the validity, as against conflicting contractual obligations, of statutes or regulations prohibiting rebates, concessions or discriminatory freight rates, Armour Packing Co. v. U. S., 209 U. S. 56 (1908); New York v. United States, 257 U. S. 591 (1922); Lewis, Leonhardt & Co. v. Southern R. Co., 217 Fed. 321, 324 (C.C.A. 6th, 1914); W.M. Carter Planing Mill Co. New Orleans, M. & O. Co. R. Co., 112 Miss. 143, 72 So. 884 (1916. Contracts providing for free passes must also yield to the statutory provision against receiving "a greater or less or different compensation" for the transportation of persons or property than that specified in the published schedule of rates. Louisville & Nashville R. Co., v. Mottley, 219 U.S. 467 (1911) Louisville & Nashville R. Co. v. Crowe, 160 S. W. 759 (Ky. 1913); Bell v. Kanawaha Traction & Electric Co., 98 S.E. 885 (W. Va. 1919). The Employers' Liability Act superseded prior contractual arrangement inconsistent with its terms. Philadelphia,

Baltimore & Wash. R.R. v. Schubert, 214 U.S. 603 (1912) An agreement in restraint of trade, although lawful when made, because illegal on the passage of the Sherman Act. U.S. v. Trans-Missouri Freight Association, 166 U.S. 290 (1897) Prior contracts have also been held subject to the provisions of the Clayton Act. Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398 (C.C.A. 2nd, 1916); Elliott Machine Co. v. Center, 227 Fed. 124 (W.D. Mich. 1915). Contra, U.S. v. United States Shoe Machinery Co., 264 Fed. 138 (E.D. Mo. 1930), basing its decision, however, on its construction of the language of the Act and not on constitutional grounds.

The considerations which underlie decisions upholding the power of Congress to override the terms of prior contracts are stated in the Schubert case, supra, in the following terms:

> "The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."

Under the foregoing authorities, it is clear that the provisions of the License superseding pre-existing contracts inconsistent with the License are valid and constitutional and do not deny due process to the plaintiffs.

THE PROVISIONS OF THE LICENSE REQUIRING DISTRIBUTORS TO MAKE REPORTS AND PERMIT THE INSPECTION OF THEIR BOOKS FOR THE VERIFICATION OF SUCH REPORTS ARE VITALLY NECESSARY TO THE ADMINISTRATION OF THE LICENSE. SUCH PROVISIONS DO NOT VIOLATE AND CONSTITUTIONAL PROHIBITION.

Under point V B of this brief, we have set forth a full analysis of the provisions of the license and the mechanics of its operation. The Court will recall that it there appears that under the terms of the license distributors are required to pay for milk purchased on the basis of the use made of such milk by them. The Court will further recall that the price which each producer receives

for his milk is in part a so-called "blended" price which is computed on the basis of the use of the milk (as Class I, Class 2, Class 3) made by all of the distributors in the market. Such blended price is computed by the market administrator on the basis of reports submitted to him by distributors which reports state the use of milk in each class made by each distributor. The reason and necessity for the use of such classified price plan and the market pool designed to equalize the surplus burden among all producers are fully set forth in this analysis.

From this it appears that the provision in the license requiring distributors to report is of the very essence of the marketing plan therein provided for. The failure of distributors to make such reports renders it impossible for the market administrator to compute the blended price for the milk purchased by him and tends to break down one of the fundamental principles of the license, the securing of a uniform price for milk to all producers. It is important to note that such reports are used for the administration of the provisions of the license and the market plan there provided for. The purpose of such reports is not to reveal violations of the license on which enforcement proceedings can be based. The provision permitting the Secretary of Agriculture to verify such reports is clearly necessary in order that their accuracy may be determined. Under these circumstances, the provision requiring distributors to make reports and to permit inspection of their books is constitutional and does not violate either the fourth or fifth amendments to the Constitution prohibiting illegal searches and seizures, and prohibiting a person from being compelled in any criminal case to be a witness against himself.

The Circuit Court of Appeals for the Fifth Circuit has only recently upheld the reports and records provision of the Petroleum Code adopted under the National Recovery Act. The provisions therein contained are strongly analagous to the reports provision in the case at bar. The Petroleum Code required all producers to submit sworn reports of their daily production and further required that adequate books and records of all transactions in connection with production and transportation be maintained and kept available for inspection by the Department of the Interior. In Ryan v. Amazon Petroleum Co., (Decided May 22, 1934) the Circuit Court of Appeals, in sustaining the validity of these provisions, said:

> "The regulations touching reports and inspection of records are not in violation of the prohibition of the Fourth Amendment forbidding unreasonable searches or of the Fifth Amendment guaranteeing that no person shall be compelled in any criminal case to be a witness against himself. A producer of oil does not operate under any right or license derived from the federal government and is not subject to such vigorous treatment as if he did. But he is a citizen within the protection of the government and owes it a citizen's duty to assist in the enforcement of its laws. The object of the reports and the inspection of books is to ascertain the existence and the disposition of excess oil in order

that its interstate and foreign transportation may be stopped. The government has a right to know about this, just as it has a right to know what the citizen's income is that it may be taxed. Presumably no crime has been committed by producer or taxpayer. No criminal case is pending, and the immediate purpose is information and not prosecution. The fact that the report is required greatly tends to keep producer or taxpayer from committing a crime that would be disclosed thereby. But if he has committed a crime and is entitled to withhold evidence of it, he should at the proper time and on the specific ground that disclosure would tend to criminate him, assert the right to withhold the particular evidence. Because such a thing conceivably might occur is no reason to upset laws and regulations which are generally useful and necessary in the public business."

Thus, although in the Ryan case the reports were required from persons not subject to the Act and although the avowed purpose of the reports was to obtain evidence of violations of the Act, these provisions were sustained by the Court. A fortiori then, in the case at bar, where reports are required only from distributors who are subject to the license and where their purpose is not to disclose violations but to permit the administration of the license, their constitutionality should be sustained.

The previse provisions of the Louisville License requiring reports and the inspection of books were attacked in the case of U. S. v. Shissler supra, and specifically upheld by the Court in the following language:

"A further contention of defendants is that the burdens imposed upon the distributor by the terms of the license in the way of keeping books and records, furnishing reports and giving bond are invalid, but on this question also the authorities are against the defendants. Charlotte Etc.,R.R.Co., v. Gibbs, 142 U. S. 386; People ex rel N.Y. etc. Co. v. Squire, 107 N.Y. 593; Same v. Same, 145 U. S. 175; Chicago etc. Coal Co. v. People 181 Ill., 270; State v. Wordin, 56 Conn. 216."

In Baltimore & Ohio R. R. Co., v. Interstate Commerce Commission, 221 U. S. 612, the Court sustained a provision of the Hours of Labor Act, requiring carriers to make monthly reports showing the instances where employees subject to the Act had been on duty for a longer period than that allowed. Such reports which compelled disclosure of violations of the law would clearly be more objectionable than those required by the Milk License. The Court, in upholding this provision of the Act, disposed of the objections made under the fourth and fifth amendments very briefly as follows:

"Fourth. There is the final objection that to compel the disclosure by these reports of violations of the law is contrary to the Fourth and Fifth Amendments to the Constitution of the United States.

"<u>The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.</u>"

See also <u>Interstate Commerce Commission v. Goodrich Transit Co.</u>, 224 U. S. 194; <u>Flint v. Stone Tracy Co.</u>, 220 U. S. 107; <u>Bartlett Frazier Co., v. Hyde</u> 65 Fed. Sec. 350 (C.C.A. 7th Circuit, 1933)

CONCLUSION

For the reasons set forth in points I to IV of this brief, the Government submitts that the bill of complaint in this case should be dismissed. However, even if this Court should decide the questions which we there argued adversely to the Government, and should deny its motion to dismiss the bill of complaint, we submit, for the reasons set forth in point V of this brief, that the Louisville Milk License is valid and constitutional and hence, plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted,

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